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TRANSCRIPT OF RECORD

537028

Supreme Court of the United States

OCTOBER TERM, 1942

No. 275

PACIFIC COAST DAIRY, INC., APPELLANT,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED JULY 31, 1942.

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INDEX.

	Original	Print
Proceedings in Supreme Court of California	1	1
Petition for writ of mandamus	1	1
Exhibit "A"—Order to show cause why license should not be suspended or revoked	11	6
Exhibit "B"—Complaint	13	7
Points and authorities on petition for writ of mandamus	18	10
Return of respondents to petition for writ of mandate	23	10
Order granting alternative writ of mandate	26	13
Docket entries	27	13
Opinion, Traynor, J., and judgment	27-a	14
Petition for appeal to Supreme Court of United States	28	26
Assignment of errors	31	27
Order allowing appeal	58	28
Citation and service (omitted in printing)	61	
Order fixing amount of bond	64	29
Bond on appeal (omitted in printing)	65	
Praecipe for transcript of record	69	29
Certificate of clerk (omitted in printing)	72	
Statement of points to be relied upon and designation of record	73	30
Order postponing further consideration of the question of jurisdiction	75	31

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[fol. 1] [File endorsement omitted]

[fol. 2] **IN SUPREME COURT OF CALIFORNIA**

No. 16694

PACIFIC COAST DAIRY, INC., a corporation, Petitioner,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; William J. Cecil, Director of Agriculture of the State of California; Bureau of Market Enforcement of the State of California; C. J. Carey, Chief; E. E. Brown, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California, Respondents

PETITION FOR WRIT OF MANDAMUS—Filed November 18, 1941

To the Honorable Phil S. Gibson, Chief Justice, and to the Associate Justices of the Supreme Court of the State of California:

Your petitioner, Pacific Coast Dairy, Inc., respectfully shows:

I

That it is the real party in interest in the above entitled action.

II

That at all times herein mentioned Pacific Coast Dairy, Inc. was, and is now, a corporation organized and existing under the laws of the State of California, and doing busi-
[fol. 3] ness in the San Francisco County Marketing Area, San Mateo County and in the Santa Clara County Marketing Area, State of California, and was, and now is, a distributor of fluid milk as that term is defined in Section 735.3, Subdivision (f) of the Agricultural Code of this State, and that at all of the times herein mentioned Pacific Coast Dairy, Inc., a corporation, was, and now is, licensed as a distributor of fluid milk, in accordance with and by virtue of the aforesaid Chapter 10, division IV of the Agricultural Code.

III

That an order to show cause has been issued to the said Pacific Coast Dairy, Inc., petitioner, why its license should not be suspended, or revoked, or such other action taken in relation thereto as is provided by the Agricultural Code, Section 737.7 a, b and c, as well as other provisions of the Agricultural Code, which order to show cause is returnable on Friday, the 21st day of November, 1941, at the hour of 2:00 o'clock P. M. in the office of the District Supervisor, in the State Agriculture Building, Embarcadero at Mission Street, San Francisco; that said order to show cause is based upon a complaint filed by one E. E. Brown, Auditor of the Bureau of Market Enforcement and respondent here, and a copy of this order to show cause and the complaint upon which it is based is annexed hereto and made a part hereof as Exhibits A and B.

IV

[fol. 4] That the Director of Agriculture and the other respondents herein have no power or authority or jurisdiction over the petitioner herein for the acts set forth in said complaint; that on or about October 15th, 1941, as set forth in said complaint, the petitioner corporation entered into a contract with the War Department of the Federal government, signed by the Quartermasters' Department of Moffett Field, whereby said petitioner agreed to deliver and sell to said War Department fluid milk for $0.025 for half-pint, which the complaint alleges is less than the minimum wholesale price established in the Santa Clara Marketing Area; that said respondents and said Department of Agriculture have no control, authority or power over said contract with the Government of the United States; that their jurisdiction does not extend over any of the acts set forth in said complaint, but that said acts were all committed, to-wit, sales and delivery, within the exclusive jurisdiction of Federal Territory; to-wit, Moffett Field, over which the State of California, or Department of Agriculture has no sovereignty, and the acts of the respondents constitute a wrongful and unlawful interference with the administration of Moffett Field by the War Department of the Federal government and with the contracts thereof; that the proceedings set forth herein and all other proceedings of a punitive nature found in the Agricultural Code

are void and an unwarranted interference with the Federal government's exclusive jurisdiction over Moffett Field.

[fol. 5]

V

That your petitioner has no plain, speedy or adequate remedy at law and the revocation of the license of your petitioner would cause irreparable damage and hardship to the business of your petitioner in the marketing areas set forth in said complaint, and petitioner could not be compensated in damages and will suffer more damage than will be suffered by the respondents herein if they fail to accomplish the revocation of said license, or take other proceedings, civil or criminal, under the Agricultural Code.

VI

That application is made to this Court originally for said Writ of Mandamus on account of the great importance of the issues involved, and involves the constitutionality of the Agricultural Code in its enforcement provisions, as applied and interpreted by the enforcement officers and the Director of Agriculture, respondents, and, particularly, the new Amendments to said Agricultural Code, Sections 6 and 7 of 736.3 of the Agricultural Code; whereas, if properly construed and interpreted, said sections would not necessarily be unconstitutional;

Furthermore, there is pending in this Court at the present time the case of Consolidated Milk Producers for San Francisco, a corporation, Petitioner, v. William B. Parker, Director of Agriculture of the State of California, Respondent, S. F. No. 16,589, which is set for argument on Decem-
[fol. 6] ber 3, 1941 before the above entitled Court, in which the issues are exactly the same as in this application, with the exception of the Amendments of 1941 herein referred to, which, we maintain, do not change the law in any particular. In the meantime it is unjust that prosecutions and hearings for revocation of license should continue against your petitioner, or other milk distributors, until these issues are finally set at rest. The whole controversy may be determined at one time; the same authorities apply to both proceedings, and it is unjust that your petitioner who is the real party in interest should be subjected to such prosecutions or hearings until the controversies are finally determined.

VII

That by the Constitution of the United States it is provided as to powers of the Congress (Section VIII, Paragraph 17 of Article I):

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles Square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; —And

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all [fol. 7] other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

That for more than fifteen years ago Moffett Field was purchased by the Government of the United States for erecting forts, magazines, arsenals, dock-yards and other needful buildings, and the Government of the United States still occupies Moffett Field and uses it for the same purposes; that by Section 34 of the Political Code it is provided:

"Legislative consent to purchase, etc. of lands by United States for public use; jurisdiction over. The legislature consents to the purchase or condemnation by the United States of any tract of land within this state for the purpose of erecting forts, magazines, arsenals, dock-yards, and other needful buildings, upon the express condition that all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made."

Therefore all authority or State sovereignty has ceased over said Moffett Field and the sovereignty belongs to the Government of the United States.

VIII

When, therefore, a purchase of land for any of these [fol. 8] purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased, by the very terms of the Constitution, ipso facto falls within the exclusive legislation of Congress, and the state jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the state legislature is, by the very terms of the Constitution, by which all the states are bound, and to which all are parties, a virtual surrender and cession of its sovereignty over the place. (Mr. Justice Story.)

IX

That your petitioner has no plain, speedy or adequate remedy at law and untold damage will result to this petitioner if these proceedings are permitted to go forward; that there is absolute lack of jurisdiction for them and they are unwarranted interference with the administration of the War Department of the United States Government, and an impairment of our dual form of government and a conflict between our state administration and the Federal administration, which should not be tolerated. Your petitioner will therefore be deprived of its property by the acts of the law enforcement officers of the state government, respondents here, without due process of law under the Fourteenth Amendment of the Constitution of the United States.

Wherefore, petitioner prays that an Alternative Writ of [fol. 9] Mandamus issue to the respondents here by Order of this Court restraining them, and each of them, in the meantime from taking any further proceedings by way of hearings, or revocation of license under Section 737.11 of the Agricultural Code, until the hearing and decision of the above entitled Court on this petition, and we ask that the matter be set for hearing at the same time as the companion case herein referred to on the 3rd day of December, 1941, and that a Writ of Mandamus issue directed to re-

spondents ordering them to set aside the order to show cause and dismissing the proceedings set forth herein.

Pacific Coast Dairy, Inc., a Corporation, by Dennis McCarthy, Vice-President.

Vincent W. Hallinan, Carey Van Fleet, Attorneys for Petitioner.

[fol. 10] *Duly sworn to by Dennis McCarthy. Jurat omitted in printing.*

Admission of service of a copy of the within application for a Writ of Prohibition is hereby admitted this — day of November, 1941.

Department of Agriculture of the State of California; William J. Cecil, Director of Agriculture of the State of California; Bureau of Market Enforcement of the State of California: C. J. Carey, Chief; E. E. Brown, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California, Respondents, by Earl Warren, Attorney General,

By W. R. Augustine, Deputy.

[fol. 11] EXHIBIT "A" TO PETITION

Before the Department of Agriculture, Bureau of Market Enforcement, State of California

SF M-250

E. E. BROWN, Complainant,

vs.

PACIFIC COAST DAIRY, INC., a Corporation, Respondent

ORDER TO SHOW CAUSE WHY LICENSE SHOULD NOT BE DENIED

Upon Reading And Filing the attached verified complaint, a copy of which is hereto affixed, and hereof made a part,

And It Appearing therefrom that the respondent above named has violated the Agricultural Code of the State of California, as more fully appears from the attached,

And Good Cause Appearing,

It Is Ordered:

That respondent above named appear before Mr. C. J. Carey, Chief, Bureau of Market Enforcement, State Depart-

ment of Agriculture, at Room 23, Agriculture Building, Embarcadero at Mission, San Francisco, California, on Saturday, the 15th day of November, 1941, at the hour of [fol. 12] 9:30 o'clock a. m. then and there to show cause, if any it has, why respondent's license as a distributor of fluid milk, previously issued by said Department and Bureau, should not be suspended or revoked or such other action taken in relation thereto as is by said Agricultural Code in such cases provided;

It Is Further Ordered that upon the failure of respondent to appear in answer thereto, such action as may be proper in the premises be taken forthwith.

C. J. Carey, Chief, Bureau of Market Enforcement, by (Signed) R. I. Morse, District Supervisor.

Dated: This 5th day of November, 1941.

[fol. 13] EXHIBIT "B" TO PETITION

State of California, Department of Agriculture, Bureau of Market Enforcement

SF M-250

Verified Complaint

E. E. BROWN, Complainant,

vs.

PACIFIC COAST DAIRY, INC., a Corporation, Respondent

VIOLATION OF DIVISION IV, CHAPTER 10 OF THE AGRICULTURAL CODE AND OF STABILIZATION AND MARKETING PLANS FOR FLUID MILK, SANTA CLARA MARKETING AREA

Complainant alleges:

I

That he is a duly authorized, appointed and acting auditor of the Bureau of Market Enforcement, California State Department of Agriculture, and as such is charged with the enforcement of Chapter 10, Division IV of the Agricultural Code of the State of California; that he is a con-

sumer of fluid milk within the meaning of Section 735.3, Paragraph J of the Agricultural Code; that he is an interested party within the meaning of Section 737.11 of the Agricultural Code.

II

That at all times herein mentioned the respondent [fol. 14] Pacific Coast Dairy, Inc., was and now is a corporation organized and existing under the laws of the State of California and doing business in the San Francisco County Marketing Area, San Mateo County and in the Santa Clara County Marketing Area, State of California and was and now is a distributor of fluid milk as that term is defined in Section 753.3, Subdivision F of the Agricultural Code in this State, and was and now is engaged in the business of selling and distributing fluid milk in the Santa Clara County Marketing Area, State of California; that at all times herein mentioned, Pacific Coast Dairy, Inc., was and now is licensed as a distributor of fluid milk in accordance with and by virtue of the aforesaid Chapter 10, Division IV of the Agricultural Code.

III

That at all times herein mentioned there was and now is in full force and effect General Order No. 98 of the Director of Agriculture of the State of California duly and regularly approved, formulated, ordered and established under and in accordance with the provisions of the Agricultural Code of the State of California, which said General Order No. 98 describes the Santa Clara County Marketing Areas as follows:

"All of Santa Clara County excluding that portion of said County which lies north and east of Arastradero Road beginning at a point where said Road intersects the Boundary of San Mateo and Santa Clara County and following north and east along said Arastradero Road until said Road intersects with U. S. Highway No. 101, Alternate, [fol. 15] thence following along Charleston Road to a Point where said Road intersects Adobe Creek, thence following Adobe Creek to its outlet in San Francisco Bay."

A copy of said General Order No. 98 is atached hereto, made a part hereof and marked "Exhibit A".

IV

That at all times herein mentioned there was and now is in full force and effect in the said Santa Clara County Marketing Area, State of California, a stabilization and Marketing plan, duly and regularly approved, formulated, ordered and established by the Director of Agriculture of the State of California under and in accordance with the provisions of the Agricultural Code of the State of California; copy of said Stabilization and Marketing Plan is attached hereto, made a part hereof and marked "Exhibit B".

V

That at all times herein mentioned there were and now are in full force and effect in said Santa Clara County Marketing Area, State of California, schedules of minimum wholesale and minimum retail prices for fluid milk, duly and regularly approved, formulated, ordered and established by the Director of Agriculture of the State of California, under and in accordance with the provisions of the Agriculture Code of the State of California; a copy of said schedules of minimum wholesale and minimum retail prices for fluid milk are attached thereto, made a part hereof and marked "Exhibit C".

[fol. 16]

VI

That Moffett Field is located in Santa Clara County at Mountain View about 35 miles southeast of San Francisco, California, and is situated in the geographical area within the outer, outside and external boundaries or limits of the Santa Clara Marketing Area as described in General Order No. 98 of the Director of Agriculture of the State of California.

VII

That on or about October 15, 1941, the respondent corporation entered into a contract with the War Department of the Federal Government signed by the Quartermaster's Department of Moffett Field whereby said respondent agreed to deliver and sell to said War Department fluid milk for $0.025 per half-pint, which price is less than the minimum wholesale price established for fluid milk in half-pint containers in said Santa Clara Marketing Area.

VIII

That on or about November 1, 1941, said respondent did purchase, process, bottle, transport and deliver fluid milk in the Santa Clara County Marketing Area, which milk was sold or disposed of by the respondent corporation in accordance with the above mentioned contract at less than the minimum wholesale prices effective in the Santa Clara County Marketing Area, to the Federal Government at Moffett Field, all of which is contrary to and constitutes a violation of the terms and provisions of the Stabilization [fols. 17-18] and Marketing Plans of the Santa Clara Marketing Area as set forth in Exhibit B and more particularly the terms and provisions of said Chapter 10, Division IV of the Agricultural Code, Section 736.3, Paragraph A, Subsection 6;

Wherefore complainant prays that this complaint be filed and that the Director of Agriculture call and hold a hearing thereon in accordance with the applicable provisions of the Agricultural Code; that the Director of Agriculture, after such hearing, enter into his office a decision specifying the facts established at such hearing, and include in said decision an order revoking the license of respondent as a milk distributor; that said Director do any and all other things and issue any and all other orders which said Director may deem fitting and proper in accordance with his powers and the provisions of the law applicable thereto.

(Signed) E. E. Brown.

Duly sworn to by E. E. Brown. Jurat omitted in printing.

[fol. 19] In Supreme Court of California

[Title omitted]

Points and Authorities on Petition for Writ of Mandamus—Filed November 18, 1941

To the Supreme Court of the State of California:

Petitioner herein respectfully submits the following points and authorities in connection with the petition for an Alternative Writ of Mandamus.

Why can a state by virtue of its control over these milk distributors on account of activities outside Moffett Field impose convictions upon them, or control them in any way, because of things done in Moffet Field? A plain question by one of the Judges of this Court heretofore interposed in a previous hearing, and a plain answer in the following authorities:

Collins v. Yosemite Park, Etc. 304 U. S. 518-539;
Standard Oil Co. v. California, 291 U. S. 242-245;
Arlington Hotel v. Fant, 73 L. ed. 447, 278 U. S. 439;
[fol. 20] State v. Unzeuta, 281 U. S. 138; 74 L. ed. 761;
Surplus Trading Co. v. Cook, 281 U. S. 647, 74 L. ed. 1091;
Hartford Acc. etc. v. Delta, etc. 292 U. S. 143; 78 L. Ed. 1178;
Home Ins. Co. v. Dick, 281 U. S. 397; 74 L. ed. 926;
Estate of Thornton, 1 Cal. 5.

From the case of Home Insurance Co. v. Dick, supra, we quote as follows:

"Second. The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even if contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is with-
[fol. 21] out significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against depriva-

tion of property without due process of law: Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U. S. 87, 72 L. ed. 177, 48 Sup. Ct. Rep. 100; Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342, 45 Sup. Ct. Rep. 129; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 62 L. ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918E, 593. Compare Modern Woodmen v. Mixer, 267 U. S. 544, 551, 69 L. ed. 783, 785, 41 A. L. R. 1384, 45 Sup. Ct. Rep. 389."

We see nothing in the Brief of petitioner in Consolidated Milk Producers v. Parker, which justifies the power of the State in interfering with these contracts or having to do in any way with sales and deliveries in Moffett Field, or any other Federal ceded territory. The state cannot do indirectly what it could not do directly. It cannot punish or recall a license, which is a punishment, for acts performed within Federal territory of Moffett Field. The argument of the brief in that case that the Presidio is within the State and is therefore subject to regulation is easily answered. Moffett and Presidio Fields are within the State geographically, but they are not within the State [fol. 22] sovereignty. Exclusive jurisdiction, as Justice Story says, means exclusive legislation.

United States v. Cornell, Federal Cases 14867 (1819).

Respectfully submitted, Vincent W. Hallinan, Carey Van Fleet, Attorneys for Petitioner.

[fol. 23] [File endorsement omitted.]

[fol. 24] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

RETURN OF RESPONDENTS TO PETITION FOR WRIT OF MANDATE AND TO ALTERNATIVE WRIT OF MANDATE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF—Filed December 3, 1941

Now moves the respondents above named and present this their return to the petition for writ of mandate heretofore filed herein and to the alternative writ of mandate issued herein on the 25th day of November, 1941.

Respondents allege that said petition does not state facts sufficient to constitute a cuase of action or to enable petitioner to the relief prayed for in said petition or to any relief.

Wherefore, respondents pray that petitioner take noth-
[fol. 25] ing by said petition and that the alternative writ of mandate heretofore issued herein be discharged and that the proceedings herein be dismisseed.

Dated: December 3, 1941.

Earl Warren, Attorney General of the State of California; W. T. Sweigert/s, Assistant Attorney General; W. R. Augustine/s, Deputy Attorney General, Attorneys for Respondents.

[fol. 26] In Supreme Court of California, in Bank.

Pacific Coast Dairy, Inc.,

v.

Department of Agriculture, etc., et al.

Order Granting Alternative Writ of Mandate—Filed November 24, 1941

Let an alternative writ of mandate issue in the above entitled matter, returnable before this Court in bank at its courtroom in San Francisco, on December 3, 1941, at ten o'clock a. m.

Dated: Nov. 24, 1941.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 27] In Supreme Court of California

[Title omitted]

Docket Entries

Nov. 18, 1941. Filed petition for writ of mandate and P&A.

Nov. 24, 1941. Alternative writ of mandate ordered to issue, returnable in S. F. Dec. 3, 1941.

Nov. 25, 1941. Alternative Writ of Mandate issued.

Dec. 3, 1941. Matter (mandate) called. On oral stipulation petitioner granted 10 days to file brief; respondent 5 days to reply thereto. Matter then to be submitted. W. E. Licking, Assistant U. S. Attorney, granted leave to file brief as a. c. on behalf of the United States of America within 10 days.

Dec. 3, 1941. Filed return to petition for writ of mandate and alternative writ of mandate and p&a in support thereof.

Dec. 10, 1941. Filed additional auth. on pet. for writ of mandate.

Dec. 15, 1941. Filed Petitioner's Memo. in reply to return of resps.

1942

Jan. 13. Matter submitted.

Jan. 16. Filed brief of Frank J. Hennessey, U. S. Atty. and Wm. E. Licking, Asst. U. S. Atty. as a. c. on behalf of the United States.

Jan. 23. Filed respondent's reply to petitioner's memo. and brief of A. C. (U. S.)

Mar. 12. The alternative writ of mandamus is discharged and the petition for a peremptory writ is denied.

Traynor, J.

We concur; Gibson, C. J., Curtis, J., Shenk, J., Houser, J., Edmonds, J., Carter, J.

March 17. By the Court: The opinion heretofore rendered herein is amended by the insertion of the following in the paragraph next to the last, after the word "competition" in the fifth line from the end of the paragraph: "(10 U. S. C. sec. 1201) and Regulation 5-240 (g) of the United States Army provides that it is impracticable to secure such competition".

[fol. 27a] IN SUPREME COURT OF CALIFORNIA

[File endorsement omitted]

OPINION—Filed March 12, 1942

In 1935 the California legislature passed an act regulating the marketing and distribution of fluid milk and fluid cream. (Cal. Agric. Code, div. 4, ch. 10, secs. 735-738.)

The act declares that it is the policy of the state to promote the intelligent production and orderly marketing of such essential commodities as milk; that an adequate supply of wholesome milk is vital to the public health; that the production, transportation, processing, storage, distribution, and sale of milk and cream therefore constitute an industry affected with a public interest; and that unfair and destructive trade practices in the production, marketing, and distribution of milk and cream have menaced the public health by undermining sanitary regulations, which cannot of themselves guard against serious deterioration in the supply of milk. (Agric. Code, sec. 735.) It sets forth as one of its objectives the elimination of "speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers. * * *"

The act as amended (Cal. Stats. 1937, ch. 3, 413, 710; Stats. 1941, ch. 1214) empowers the Director of Agriculture to set up defined marketing areas within the State, to prescribe minimum prices for fluid milk and fluid cream to be paid by distributors to producers in accordance with stabilization and marketing plans for such areas (secs. 735.4 (b) (4) (5) and 736.3 (b) (c)), to prescribe minimum wholesale and retail prices of fluid milk and fluid cream within each area (Agric. Code, secs. 736.11, 737.12), to license milk distributors within each area, to revoke or suspend licenses for violation of any stabilization and marketing plan, and to bring actions to enjoin such violations. (Agric. Code, sec. 737.7.)

The petitioner seeks a writ of mandamus ordering the Director of Agriculture to dismiss proceedings undertaken pursuant to section 737.11 of the Agricultural Code with the object of revoking petitioner's license. In these proceedings it is alleged that petitioner violated section 737.3 (a) (6) of the code and of the Stabilization and Marketing Plan for the Santa Clara Marketing Area by purchasing, processing, bottling, transporting, and delivering in the Santa Clara Marketing Area fluid milk that it sold to the Federal Government for less than the minimum wholesale prices prescribed for that area. The sale occurred on Moffett Field, territory within the geographic boundaries of the Santa Clara Marketing Area, but subject to the exclusive jurisdiction of the federal government.

Since the demand for fluid milk fluctuates from day to day and cannot be anticipated exactly, the producers must supply enough milk to meet all reasonable needs; then any surplus, or "stand by," is converted into milk products and sold by the distributors at lower prices, with corresponding lower receipts for the producers. The possibility of a surplus has been a constant threat to the stability of prices paid to the producers, given the reluctance of distributors to pay the full price for milk that becomes in part converted into milk products. A stabilization plan counteracts this downward pull by establishing minimum prices for fluid milk. At the end of a given period, the distributor settles his accounts with the producer by paying him a "blended price" representing the price for fluid milk bought less the difference between that price and the price for the milk converted into milk products. Even then the [fol. 27b] producer does not know what the blended price will be until the expiration of the period for settling accounts. The minimum price of fluid milk, however, represents a fixed element in the blended price that affords him at least some protection against speculation at his expense in the distribution of milk. If the distributor were under no compulsion to pay a minimum price he would seek to shift to the producer the risk of speculation in a fluctuating market by paying him the lowest possible price, not only for fluid milk sold to consumers but for milk converted into milk products, and there would soon be adverse effects on standards of production.

The same adverse effects would result if the minimum price established by a stabilization plan were not uniformly enforced. The act itself anticipates that possibility by specifying that there may be no departures from the minimum price even when the milk is sold to the federal government on territory within the exclusive jurisdiction of that government. Section 736.3 (a) provides that any stabilization and marketing plan shall prohibit distributors and retail stores from engaging in such unfair practices as:

"(7) The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than

the minimum prices established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

"(8) The purchasing or receiving of any fluid milk or fluid cream by distributors from producers within a marketing area wherein a stabilization and marketing plan is in effect for less than the minimum prices established in such plan, regardless of whether such milk or cream is subsequently sold or distributed within or without such marketing area, or within or without the jurisdiction of the State of California."

The validity of such provisions is clear. (*Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Alabama* v. *King and Boozer*, 62 Sup. Ct. 43; *James* v. *Dravo Contracting Co.*, 302 U. S. 134.)

In its original form in 1935 the milk control act prescribed minimum prices to the producers only. To prescribe such prices without also prescribing minimum resale prices is ineffectual, however, since the distributors cannot pay the producers the prescribed prices unless they have some guarantee of corresponding returns. Minimum resale prices, moreover, must govern all transactions, particularly those of the producer who is his own distributor and who is otherwise apt to sell to consumers at prices below those at which regular distributors are required to operate. In the light of these considerations, Article 2A was added in 1937 to provide for minimum wholesale and retail prices. Section 736.11 provides that in all marketing areas where a [fol. 27c] stabilization and marketing plan is in effect the Director of Agriculture shall prescribe minimum wholesale prices at which milk shall be sold by distributors to retail stores, and minimum retail prices at which fluid milk shall be sold by distributors and retail stores to consumers. Section 736.12 provides that in determining minimum prices for any marketing area the director shall make an investigation relative to that area of such factors as the quantities of fluid milk distributed and normally required by consumers, the price to distributors and their handling costs, and the available capacity for processing and distributing. Section 736.13 prohibits sale by distributors at less than the prescribed prices.

The most real danger to the prescribed minimum lies in sales by distributors at lower prices on areas within the exclusive jurisdiction of the federal government, where transactions cannot be regulated by the State. Prescribed minimum prices fail of their purpose if they lie in the shadow of cut prices. The route of the milk from the producer to the consumer is a continuous one even when it crosses the imaginary line that demarcates federal jurisdiction, and the evil effects of substandard prices in the federal area course backward to play their part in undermining the intelligent production and orderly marketing that the State has declared essential to the public health. The State has therefore undertaken to regulate the milk industry within the bounds of its jurisdiction in such a manner as to obviate the elusive evils that it could not directly attack. Section 736.3 (a) (6) of the Agricultural Code provides that any stabilization and marketing plan shall prohibit distributors and retail stores from engaging in such unfair practices as,

"(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

The Stabilization and Marketing Plan for the Santa Clara Marketing Area contains the provisions outlined by this section. These regulations are directed at the milk before it can enter the stronghold of an area within the State's boundaries but outside its jurisdiction on terms that would menace the entire milk supply. The alleged violation in the present case is the purchasing, processing, bottling, transporting, delivering, and other handling of milk within the Santa Clara Marketing Area for prospective sale at a point outside the jurisdiction of the State at prices less than the minimum prescribed for that marketing area. Petitioner contends that the State's control over activities within its jurisdiction affords it no authority to impose penalties

because of transactions on Moffett Field. This contention proceeds from the theory that such penalties violate the due process clause of the 14th Amendment to the Constitution of the United States, denying to a State the power to restrict or control activities, persons, and property beyond [fol. 27d] its jurisdiction. (*Standard Oil Co. of California* v. *California*, 291 U. S. 242; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U S. 346; *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 275 U. S. 587; *Home Ins. Co.* v. *Dick*, 281 U. S. 397.) This contention, however, confuses the State's control over activities, persons, and property within its jurisdiction and the repercussions of that control in areas outside thereof. The question is not whether the State can prescribe the minimum prices at which milk may be sold on the territory within the exclusive jurisdiction of the United States (*Cf. Consolidated Milk Producers* v. *Parker*, this day decided), but whether it has power to regulate acts within its jurisdiction even though they are followed in direct line of succession by a transaction outside its jurisdiction.

It is established that a State may validly regulate activities, persons, and property within its jurisdiction, even though extra-territorial repercussions ensue, whenever such regulation is vital to the welfare of its inhabitants. The propriety of the regulation is determined by its focus upon an internal problem and not by the range of its influence. Thus, in *Mirkovitch* v. *Milnor*, 34 Fed. Supp. 409, the court held that the State could exercise its police power over boats within State waters in a manner that was bound to affect their activities beyond State borders. Threatened with the depletion of its fish supply by the practices of certain fishermen, California provided in the Fish and Game Code that no person shall use a boat in this State or its waters that delivers to any point outside the State fish caught from the boat in the waters of the Pacific Ocean within the State or on the high seas or elsewhere without authorization of the Fish and Game Commission. The court pointed out that the code provision related solely to the operation within State waters of fishing vessels delivering their catch outside the State, and emphasized that the provision was designed not to regulate fishing operations beyond the State's jurisdiction but to protect the State's fisheries from depletion. The realization that the plaintiff

might be unable to carry on fishing operations beyond the State's jurisdiction without entering and operating his boat within State waters did not deter the court from declaring that the statute was a valid exercise of the State's police power over acts within its jurisdiction.

In *Osborn* v. *Ozlin*, 310 U. S. 53, the United States Supreme Court upheld a Virginia statute requiring that insurance policies for persons or property in Virginia written by companies authorized to do business in Virginia be countersigned by a local agent receiving a certain percentage of the commission, even though insurer and insured are both outside of Virginia when the contract of insurance is negotiated. The close relation between the insurance contracts and the insured persons or property, together with [fol. 27e] the State's interest in protecting such persons and property, justified the regulation despite its extraterritorial effect. The court stated: "But the question is not whether what Virginia has done will restrict appellant's freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that State action may have repercussions beyond State lines is of no judicial significance so long as the action is not within that domain which the Consfitution forbids. • • • Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it." (Pages 62-63.) (See, also, *Holmes* v. *Springfield Fire & Marine Insur. Co.*, 51 Sup. Ct. 19; 32 Fed. Supp. 964; *National Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, and *Palmetto Fire Ins. Co.* v. *Conn.*, 272 U. S. 295; Brandeis's dissent in *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 377; *cf. Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426.

Again in the application of State workmen's compensation laws, it is established that where the injury occurs in one state and the contract of employment is entered into in another, the statute of the state with the greater interest in the welfare of the injured workman controls. (*Alaska Packers Assn.* v. *Industrial Acc. Com. of California*, 294 U. S. 532; *Pacific Employers Ins. Co.* v. *Industrial Acc.*

Com. of California, 10 Cal. (2d) 567.) In the Alaska Packers case the California Workmen's Compensation Act was held applicable to an injury sustained in Alaska by a workman who resided in California and entered into the contract of employment here. The court noted California's interest in the welfare of the injured workman, stating: "Obviously the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences." (Page 541.) (See, also, *J. C. Penney Co.* v. *Wisconsin Tax Com.*, 311 U. S. 435; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412; *Nelson* v. *Sears Roebuck Co.*, 61 Sup. Ct. 586.)

The foregoing cases establish that a State may exercise its power over things within its jurisdiction in the knowledge that it will thereby influence things beyond its jurisdiction, and that its influence may be far reaching, so long as the external consequences remain incidental to the solution of internal problems. Their application to the present case is clear. In accomplishing the objectives of the State Milk Control Act the State is concerned, not with the destination and sale of the milk but with the effect of the price [fol. 27f] of the milk upon the conditions of production. A price below the fixed minimum for milk produced in the State endangers those established standards for the milk industry that safeguard the public health, and leads successively to a breakdown of the law, price cutting, diminishing returns to the producers, inferior standards of milk production and finally injurious effects on the public health. The State has regulated the purchasing, processing, bottling, transporting and handling of fluid milk within its jurisdiction with the object, not of controlling transactions beyond its jurisdiction, but of stabilizing within its jurisdiction the production of a commodity vital to the public health.

The State Milk Control Act, however clear its validity under the due process clause, must be scrutinized further in the light of the commerce clause and the Federal Agricultural Marketing Agreement Act of 1937 (50 U. S. Stats. 246), held constitutional in *United States* v. *Rock Royal Co-op.*, 301 U. S. 533. The federal act authorizes the Secretary of Agriculture to enter into marketing agreements fixing minimum prices to be paid producers for milk that is "in the current of interstate or foreign commerce" or that

"directly burdens, obstructs or affects interstate or foreign commerce." (Sec. 8 (c) (1), (2), (5), (7), (8), and (18)). It defines interstate or foreign commerce as "commerce between any State, Territory or possession, or the District of Columbia, but through any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory, or possession, or the District of Columbia. For the purpose of this chapter • • • a marketing transaction in respect to an agricultural commodity or product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. • • • As used herein, the word 'State' includes Territory, the District of Columbia, possessions of the United States, and foreign nations." (Sec. 10(j)). The extensiveness of this definition leaves no doubt that Congress intended to cover the broadest possible field that might come within its powers to regulate interstate commerce and to govern territories.

The shipments of milk from California to such areas as Moffet Field, where the transit ends, fall within this definition of interstate commerce, for Moffett Field can be classified as either a territory or possession of the United States outside the jurisdiction of California, even though within the State's boundaries.

The contention is nevertheless advanced that transactions between such federal areas as Moffet Field and the rest of the State do not come within the power of Congress to regulate interstate commerce, because such areas do not fall within the categories of States, foreign nations, or Indian tribes set forth in the commerce clause. The judicial interpretation of the commerce clause, however, has greatly amplified the meaning of interstate commerce. Thus, [fol. 27-g] commerce between States and territories has long been rec ed as interstate commerce. (*Hanley* v. *Kansas City So. y. Co.*, 187 U. S. 617; *Inter Island Steam Navigation Co.* v. *Hawaii*, 92 Fed. (2d) 412, aff'd 305 U. S.

306. Commerce between States and the District of Columbia is similarly recognized as interstate commerce. (*Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Galloway* v. *Bell*, 11 Fed. (2d) 558.) Such areas as Moffett Field are in the same category as the District of Columbia, for the same power of Congress extends over them both. (U. S. Const., Art. I, sec. 8, cl. 17; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525.) In the light of the foregoing cases it is clear that the power of Congress to regulate interstate commerce, reinforced by its authority over territories and "forts, magazines, arsenals, dockyards and other needful buildings" enables it to regulate commerce between States and such areas as Moffett Field. (Compare *People* v. *Standard Oil Co.*, 218 Cal. 123; *Grayburg Oil Co.* v. *State*, 286 S. W. 789; *Grayburg Oil Co.* v. *State*, 3 S. W. (2d) 427, and *McKesson & Robbins* v. *Collins*, 18 Cal. App. 648, which did not involve any federal statute regulating such commerce.)

The milk industry in California is dominantly a local one. Only a small percentage of the milk produced goes beyond the jurisdiction of the State, but whatever the destination of the milk, the State is vitally concerned with the stabilization of the industry, and particularly with standards of production, in the State as a whole. The federal territory within the State is so fragmented that there may be several federal islands within a single marketing area. If they are citadels of immunity from State jurisdiction, they are also exceptional segments in areas that are otherwise subject to that jurisdiction. They stand out like colored pins on the map of California, and range from military reservations to soldiers' homes, from court houses to penitentiaries, from post offices to Indian reservations, from national parks to regional dams. (See cases cited in 38 Columbia L. Rev. 128, at 130.) The commerce between them and the rest of the State is of the greatest interest to the State regardless of the circumstance that it may be regulated by the federal government. Focussed as it is upon a State problem, the State act, despite its repercussions upon interstate commerce, does not run counter to the commerce clause so long as it does not conflict with the provisions or objectives of Congressional legislation. (*Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Duckworth* v. *Arkansas*, 62 Sup. Ct. 311; *California* v. *Thompson*, 313 U. S. 109; *South Carolina State Highway*

Dept. v. *Barnwell Bros.*, 303 U. S. 177. See 27 Cal. L. Rev. 615.)

The objectives of the federal act in fixing the minimum price payable by the distributor to the producer are the same as those of the California act, namely, to insure to the producer a reasonable return on his products (secs. 1 [fol. 27-h] and 2), and to the consumer a "sufficient quantity of pure and wholesome milk." (Sec. 8 (c) (18).) There is no federal marketing agreement or order with respect to the milk industry, however, now in effect in this State. Where a conflict is apparent the State legislation must yield. (*United States* v. *Wrightwood Dairy Co.*, 62 Sup. Ct. 523; *Cloverleaf Butter Co.* v. *Patterson*, 62 Sup. Ct. 491.) There is a question, however, whether any conflict exists when a federal administrative officer is empowered to prescribe regulations in a field already regulated by a State but does not actually do so. The United States Supreme Court has held in some cases that a conflict of authority is inherent in such a situation by interpreting the failure of the federal officer to make any regulation as in effect a ruling that neither federal nor State regulation is necessary. (*Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605.) There is a growing tendency on the part of the court, however, to emphasize the evils arising from the absence of any regulation, and to hold therefore that the existence of an unexercised superior federal authority does not rule out State regulation vital to the public welfare. This realistic view germinated in cases upholding State regulation of certain public utility practices that the Interstate Commerce Commission did not regulate although it had authority to do so. (*Northwestern Bell Telephone Co.* v. *Ry. Commission*, 297 U. S. 471; *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612.) The court has balanced, not the State regulation against the unexercised federal authority, but the importance of the State's objectives against the effects of its regulation on interstate commerce. It has rejected the theory that the failure of a federal administrative agency to exercise its authority necessarily amounts to a declaration against all regulation. Indeed, in *H. P. Welsh Co.* v. *New Hampshire*, 306 U. S. 79, it demonstrated its concern with keeping the State regulation alive in the absence of immediate conflict with federal regulation. It upheld in that case the application of a

state act regulating the hours of drivers of motor carriers to a driver transporting an interstate shipment, even though the Interstate Commerce Commission had overlapping authority and had issued regulations that would conflict with the state act when they became effective two years later. The court took the view that the safety of the people should not wait upon federal administrative action. (See, also, *Kelly* v. *Washington*, 302 U. S. 1; *South Carolina State Highway Dept.* v. *Barnwell Bros., supra; Eichholz* v. *Commission*, 306 U. S. 268; *Maurer* v. *Hamilton*, 309 U. S. 598; *Mintz* v. *Baldwin*, 289 U. S. 346.)

Public health, like public safety, is a vital concern of the State, and its maintenance at proper levels should likewise not wait upon federal regulation. Toward that maintenance the California Milk Control Act contributes largely, [fols. 27i-31] but it might well be disrupted if those engaged in interstate commerce escaped the State regulation while they were untouched by corresponding federal regulation. The absence of federal regulation may well be a recognition not only of the propriety but of the effectiveness of State regulation in the stabilization of a dominantly local industry, rather than a ruling that there should be no regulation.

There remains the question whether the Milk Control Act can validly affect milk sold to instrumentalities of the United States. In a brief filed as *amicus curiae* on behalf of the United States, the United States Attorney contends that the application of the State act to such milk would unduly burden the operation of an essential federal agency, and that it is inconsistent with the federal statutes requiring that army supplies be secured through competitive bidding. (41 U. S. C., sec 5; 10 U. S. C., secs. 1200-1201.) Federal agencies, however, cannot entirely escape the effects of State legislation. The California Milk Control Act does not discriminate against the United States army nor substantially hinder its efficient operation. The army is not precluded from obtaining milk, nor required to pay more for such milk than other consumers in the same area. The act regulates not the army but the distributors who are independent contractors with the federal government. It is settled that such contractors are subject to State control, and that consequent burden on the federal government is speculative and remote. (*Milk Control Board* v. *Gozzelin's*

Dairy, Inc., 16 N. E. (2d) 641; *Paterson Milk & Cream Co., Inc.* v. *Milk Control Board*, 118 N. J. L. 383; *Alabama* v. *King & Boozer*, 62 Sup. Ct. 43; *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Atkinson* v. *State Tax Com. of Oregon*, 303 U. S. 66; *Van Cott* v. *Utah*, 306 N. S. 511; *Helvering* v. *Gerhardt*, 299 U. S. 437; *Trinity Farm Const. Co.* v. *Grosjean*, 291 U. S. 466; see 27 Cal. L. Rev. 327.) The very federal statutes requiring competitive bidding except cases "where it is impracticable to secure competition" (10 U. S. C. sec 1201), and Regulation 5-240 (g) of the United States Army provides that it is impracticable to secure such competition: "(3) When the price is fixed by Federal, State, municipal, or other competent authority." (*Penn Dairies, Inc.* v. *Milk Control Commission*, (March 25, 1941) Court of Common Pleas of Lancaster County, Pennsylvania; *Commonwealth* v. *Rohrer* (Pa.), 37 D. & C. 410.)

The alternative writ of mandamus is discharged and the petition for a peremtory writ is denied .

We concur: Traynor, J.; Gibson, C. J.; Curtis, J.; Shenk, J.; Houser, J.; Edmonds, J.; Carter, J.

[fol. 28] [File endorsement omitted.]

[fol. 29] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 4, 1942

Comes Now Pacific Coast Dairy, Inc., a corporation, petitioner herein, and states that on the twelfth day of March, 1942 this Court entered judgment against it denying its petition for a writ of mandamus.

Petitioner, believing that the judgment of this Court is incorrect, prays that it may be allowed to appeal to the Supreme Court of the United States for reversal of the [fol. 30] judgment of this Court, and that a transcript of the record of this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Su-

preme Court of the United States to entertain an appeal in this case.

Pacific Coast Dairy, Inc., a corporation, by Carey Van Fleet, Vincent W. Hallinan, Attorneys for Petitioner.

[fol. 31] [File endorsement omitted.]

[fol. 32] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 4, 1942

The court erred:

1. In holding that the Agricultural Code of California and particularly Section 736.3 (a) (6) is constitutional when applied to a sale and delivery of milk made by the appellant in a Federal territory which, by virtue of Art. I, Sec. 8, Par. 17, of the Constitution of the United States, [fol. 33] is within the exclusive jurisdiction of the United States.

2. In failing to hold that the act in question is unconstitutional in that it constitutes an attempted exercise of control over transactions in a federal enclave outside the state's jurisdiction.

3. In failing to hold that the act is unconstitutional because it constitutes a direct interference with the purchasing and furnishing of supplies by the United States Army.

4. In failing to hold that the statute is unconstitutional because it undertakes to lay a burden upon and to control commerce between the State of California and a Federal military reservation contrary to the Commerce Clause of the Constitution.

5. In failing to hold that the act is unconstitutional because it interferes and conflicts with the competitive bidding statutes of the United States. R. S. 3709 (41 U. S. C. 5); Act of July 5, 1884, c. 217, 22 Stat. 106, 109; Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U. S. C. 1200-1201).

6. In failing to hold that the statute is unconstitutional because it constitutes an attempt on the part of the State

[fols. 34-57] to exercise supervision and control over the contracts of the United States.

7. In failing to hold that the act is unconstitutional because it attempts to regulate the terms upon which State citizens may contract with the United States.

8. In failing to hold that the act is unconstitutional because it deprives Pacific Coast Dairy, Inc., of its license without due process of law.

Pacific Coast Dairy, Inc., by R. Carey Van Fleet, Vincent W. Hallinan, Attorneys for Petitioner.

[fol. 58] [File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 4, 1942

This cause having come before this Court on this 4th day of June, 1942, upon the petition of Pacific Coast Dairy, Inc., a corporation, the petitioner herein, praying for leave to appeal to the Supreme Court of the United States for reversal of the judgment herein and that a duly certified copy of the record of this cause be transmitted to the Clerk [fol. 60] of the Supreme Court of the United States, and the Court having heard and considered this motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause, the same having been duly filed with the Clerk of the Court, it is, therefore, by the Court

Ordered and Adjudged that Pacific Coast Dairy, Inc., a corporation, petitioner herein, be and is hereby allowed an appeal from the order and judgment of this Court, dated March 12, 1942, and that a duly certified copy of the record be transmitted to the Clerk of the Supreme Court of the United States.

It is Further Ordered that Pacific Coast Dairy, Inc., be and it is hereby permitted a period of sixty days from the

date hereof within which to file and docket this appeal to the Supreme Court of the United States.

Dated: This 4th day of June, 1942.

John W. Shenk, Acting Chief Justice.

[fols. 61-63] Citation in usual form showing service on Earl Warren, et al., filed June 4, 1942, omitted in printing.

[fol. 64] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER FIXING AMOUNT OF BOND—Filed June 6, 1942

The amount of bond on appeal to the United States Supreme Court, in the above entitled cause, is hereby fixed at Five Hundred Dollars.

(Signed) John W. Shenk, Acting Chief Justice.

[File endorsement omitted.]

[fols. 65-68] Bond on appeal for $500.00, approved and filed June 18, 1942, omitted in printing.

[fol. 69] [File endorsement omitted]

[fol. 70] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed June 4, 1942

To the Clerk of the Supreme Court of the State of California:

SIR:

You are hereby requested to prepare a transcript of the record to be filed in the Supreme Court of the United States

pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following:

Pleadings, all docket entries, opinion of the Court, order [fol. 71] of the Court entering judgment, and all papers filed with the Court in the above entitled cause since the entry of judgment.

Respectfully submitted, Pacific Coast Dairy, Inc., by Carey Van Fleet, Vincent W. Hallinan, Attorneys for Petitioner.

[fol. 72] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 73] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF RECORD AND POINTS RELIED ON—Filed August 5, 1942

Pursuant to Rule 13, Par. 9 of this Court, the Appellant states that it intends to rely on all of the points in its assignment of errors.

The Appellant deems the entire record as filed in the above entitled cause necessary for the consideration of the points relied upon.

Carey Van Fleet, Attorney for Appellant.

[fol. 74] AFFIDAVIT OF SERVICE

Carey Van Fleet, being duly sworn, deposes and says: That he is the attorney for the Appellant, Pacific Coast Dairy, Inc., in the above entitled cause; that on this day, the 5th day of August, 1942, he served a copy of the within Statement of Points and Designation of Record on the attorney for the Respondents, to-wit: the Attorney General of the State of California, by registered mail addressed to the Attorney General of the State of California, State Building, San Francisco, California, and deposited it in the United States Post Office of Washington, District of Columbia, there being a direct communication by mail be-

tween the City of Washington, D. C. and the City of San Francisco, State of California.

Carey Van Fleet.

Subscribed and sworn to before me this 5th day of August, 1942. Anne Snure, Notary Public. (Seal.)

[fol. 74a] [File endorsement omitted.]

[fol. 75] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—October 12, 1942

The statement of judisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits. Counsel are requested in their briefs and on the argument to discuss whether the judgment sought to be reviewed is final within section 237 of the Judicial Code. Compare Grays Harbor Logging Co. vs. Coats-Fordney Co., 243 U. S. 251, and Wick vs. Superior Court, 278 U. S. 575, with Bandini Co. vs. Superior Court, 284 U. S. 8.

The Solicitor General is invited to submit a brief in this case, and if he so desires to participate in the oral argument.

Endorsed on cover: File No. 46,776. California Supreme Court. Term No. 275. Pacific Coast Dairy, Inc., Appellant, vs. Department of Agriculture of the State of California, et al. Filed June 31, 1942. Term No. 275, O. T., 1942.

FILE COPY

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CHARLES ELMORE CROPLEY
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 275

PACIFIC COAST DAIRY, INC.,
Appellant,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

CAREY VAN FLEET,
VINCENT W. HALLINAN,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
State statute the validity of which is involved	1
Date of the judgment and application for appeal	5
Nature of the case and rulings below	5
Appendix "A"—Opinion of the Supreme Court of the State of California	14

Table of Cases Cited.

Arizona v. *California*, 283 U. S. 423	12
Arlington Hotel Co. v. *Fant*, 278 U. S. 429	12
Baldwin v. *Seelig*, 294 U. S. 511	13
Barron v. *Burnside*, 121 U. S. 186	13
Carroll v. *Becker*, 285 U. S. 380	13
Consolidated Milk Producers v. *Parker*, 19 A. C. 898, 123 Pac. (2d) 440	11
Crandall v. *Nevada*, 6 Wall. 35	12
Detroit Railway v. *Michigan R. R. Comm.*, 240 U. S. 564	13
Hanley v. *Kansas City So. Ry. Co.*, 187 U. S. 617	13
Hartman v. *Greenhow*, 102 U. S. 672	13
Insurance Company v. *Morse*, 21 Wall. 445	13
James v. *Dravo Contracting Co.*, 302 U. S. 134	12
Johnson v. *Maryland*, 254 U. S. 51	13
McPherson v. *Blacker*, 146 U. S. 1	13
Nebbia v. *New York*, 291 U. S. 502	13
Osborn v. *Bank of the United States*, 9 Wheat. 738	12
Pacific Coast Dairy Co., Inc. v. *Department of Agriculture of the State of California*, 19 A. C. 885, 123 Pac. (2d) 442	8
Penn Dairies, Inc. v. *Mills Control Commission*, January Term, 1942, Supreme Court of Pennsylvania, Nos. 173 and 180	11
Standard Oil Co. v. *California*, 291 U. S. 242	12

Page

Stewart Co. v. *Sadrakula*, 309 U. S. 94 12
Stoutenburgh v. *Hennick*, 129 U. S. 141 13
Terral v. *Burke Construction Co.*, 257 U. S. 527 13
U. S. v. *Klein*, 303 U. S. 276 13

STATUTES CITED.

California Agricultural Code, Div. 4, c. 10, Sections 735-738 2
Section 736.3 2
Section 736.3a 2, 6, 10, 11
Section 736.6 ..... 2, 6, 10, 11
Section 737.5a 2
Section 737.7a 3, 6
Section 737.11a 3
Section 737.11b 4
Section 737.11c 4
Section 737.11d 4
Section 737.11e 5
Calif. Stats. 1941, Concurrent and Joint Resolutions, c. 65, p. 3402 11
Constitution of California, Article I, Section 8, para. 17 ..... 6, 8
Constitution of the United States, 14th Amendment 8
Judicial Code, Section 237a, as amended by the Act of February 13, 1925 1
Political Code of California, Section 34 6
Regulation 5-240(g) of the United States Army 10
Revised Statutes, 3709 (41 U. S. C. 5); Act of July 5, 1884, c. 217, 22 Stat. 106, 109; Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U. S. C. 1200-1201) 8, 12

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PACIFIC COAST DAIRY, INC., A CORPORATION,

v.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; WILLIAM J. CECIL, DIRECTOR OF AGRICULTURE OF THE STATE OF CALIFORNIA; BUREAU OF MARKET ENFORCEMENT OF THE STATE OF CALIFORNIA; C. J. CAREY, CHIEF; E. E. BROWN, AUDITOR OF THE BUREAU OF MARKET ENFORCEMENT OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Supreme Court of the United States, Pacific Coast Dairy, Inc., herewith submits its statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this case.

The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Section 237(a) of the Judicial Code as amended by the Act of February 13, 1925.

The statutes of the State of California which were held to be valid but which the Pacific Coast Dairy, Inc., contended were unconstitutional and in conflict with the laws of the United States, are set forth in California Agricul-

tural Code, Div. 4, c. 10, § 735-738, as amended, Calif. Stats. 1941, c. 1214. The pertinent provisions are as follows:

736.3. Any stabilization and marketing plan shall contain the following provisions:

(a) Provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

* * * * * * *

(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

* * * * * * *

737.5. (a) After thirty (30) days after the effective date of this chapter no distributor shall deal in fluid milk or fluid cream without first having obtained a license from the director. The special licenses provided in this section are in addition to any and all licenses required by any other section of Division 4, Agricultural Code, or any law or ordinance of any county or municipality of this State. Applications for the licenses herein provided shall be made on forms prescribed by the director and shall state the name and address of the applicant and such details as to the nature of the applicant's business as the director may require. Such applicant shall further satisfy the director of his or its character, responsibility and good faith in seeking to carry on the business stated in th application. Licenses shall be issued for a period of twelve (12) months from the first day of each year or for the remainder of the calendar year from the date of issuance. Application for a new license for the following year by

a licensee shall be made at least thirty (30) days prior to the commencement of such year, and if not so made the applicant shall pay an additional sum equal to 50 per cent of the license fee before such license shall be issued.

* * * * * * *

737.7. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any of the unfair practices set forth in this chapter, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

* * * * * * *

737.11. (a) The director may refuse to grant any license herein provided and may, after due hearing upon a verified complaint signed and filed with the director by any interested person, revoke or suspend any such license as the case may require, when he is satisfied that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter. Upon the filing of such a verified complaint, the director shall cause a copy thereof, together with a notice of the time and place of hearing of such complaint, to be served personally or by mail upon the person or persons named as respondent or respondents therein. Such service shall be made at least ten (10) days before said hearing, which shall be held in the city or town in which is situated the principal place of busi-

ness of the licensee or respondent, or in which the transaction or violation complained of is said to have occurred, or in the county seat of the county in which the transaction or violation complained of is said to have occurred, or in the nearest office of the State Department of Agriculture, at the discretion of the director. At the time and place appointed for such hearing the director or his agents shall hear the parties to said complaint, and shall enter in the office of the director at Sacramento a decision either dismissing such complaint or specifying the facts established on such hearing. A copy of such decision shall be furnished to each, every and all of the respective parties thereto.

(b) Such decision may include an order refusing, revoking or suspending the license applied for or held by the respondent, or affixing such other conditional and probationary orders as may be proper for the enforcement of this chapter or any of the provisions thereof or of any stabilization and marketing plan formulated hereunder.

(c) At the time of the filing of the verified complaint herein provided, or after any decision as above described, the director may thereupon and in the premises issue to and serve upon said person or respondent, an order directing said person or respondent to show cause why the license of said person or respondent should not be suspended or revoked for the violation complained of in the verified complaint or specified in the decision.

(d) Where the order to show cause is heard separately from the case or hearing set forth in the verified complaint, a copy of the said order to show cause, together with notice of the time and place of hearing upon said order, shall be served personally or by mail upon said person or respondent. Said order shall refer to an attached copy of a verified complaint, or to such other notice, affidavit or official document, in such a way as generally to advise and inform the respondent of the charge or violation upon which said order is

based and pursuant to which it is issued. Such service shall be made at least ten (10) days before said hearing, which shall be held in the city or town in which is situated the principal place of business of the respondent, or in which the transaction or violation complained of is said or charged to have occurred, or in the county seat of the county in which the transaction or violation complained of is said or charged to have occurred, or at the nearest office of the State Department of Agriculture, at the discretion of the director.

(e) At the time and place appointed for such hearing the director or his agents shall hear the matter set forth in the order, and the showing of the licensee in the premises, and shall enter in the office of the director at Sacramento an order and decision specifying the facts, dismissing the order to show cause or directing the suspension or revocation of the license or licenses held by the licensee, or making such other conditional or probationary orders as may be proper, upon the evidence presented at such hearing. A copy of said order and decision shall be furnished to the licensee. Previous violation by any applicant or by any person connected with said applicant of any provision of this chapter or of any stabilization and marketing plan formulated thereunder or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk and fluid cream shall be good and sufficient ground for denial, revocation or suspension of a license.

The date of the judgment filed in the Supreme Court of California is March 12, 1942. Petition for appeal is dated June 4th, 1942.

The Nature of the Case and the Ruling.

The Director of Agriculture of the State of California established the Santa Clara County marketing area within the outer, outside and external boundaries of the limits of which is located a Federal enclave known as Moffett Field

which was purchased by the Government of the United States for the purpose of erecting forts, magazines, arsenals, dock yards and other needful buildings. By Section 34 of the Political Code of the State of California consent to the acquisition of this land by the United States for public use was given by the State. Accordingly, under the provisions of Article I, sec. 8, paragraph 17, of the Constitution of the United States, all authority and state sovereignty in respect of the area known as Moffett Field has been relinquished by the State of California and the exclusive jurisdiction and sovereignty therein has vested in the United States.

Within this marketing area the Director of Agriculture of the State of California promulgated a marketing plan establishing minimum wholesale and retail prices for fluid milk. Pacific Coast Dairy, Inc., a California corporation, was and now is engaged in the selling and distribution of fluid milk in the Santa Clara County marketing area, State of California, and it was and is now licensed as a distributor of fluid milk in accordance with 737.5 (a) of the Agricultural Code of California. On October 15, 1941, Pacific Coast Dairy, Inc., entered into a contract with the War Department of the United States, signed by the Quartermaster's Department of Moffett Field, whereby it agreed to deliver and sell to the War Department fluid milk at the rate of $0.025 per half pint which amount is less than the minimum wholesale price established for the Santa Clara County marketing area.

A verified complaint against Pacific Coast Dairy, Inc., returnable on November 21, 1941, was filed with the Director, in which Pacific Coast Dairy, Inc., was alleged to have violated Section 736.3 (a) (6) of the Agricultural Code of the State of California. After stating the existence of the contract with the United States the complaint alleges that on or about November 1, 1941, it "did purchase, proc-

ess, bottle, transport and deliver fluid milk in the Santa Clara County marketing area, which milk was sold or disposed of by the respondent corporation in accordance with the above-mentioned contract at less than the minimum wholesale prices effective in the Santa Clara County marketing area, to the Federal Government at Moffett Field". The complaint prayed that the Director of Agriculture enter an order revoking the license of the appellant as a milk distributor.

On November 18, 1941, the appellant filed with the Supreme Court of California a petition for a writ of mandamus directed to the appellees restraining them from taking any further proceedings by way of hearing or revocation of license, and ordering them to set aside the order to show cause and to dismiss the proceedings, looking toward the revocation of the appellant's license. Appellant in its petition specifically challenged the constitutionality of the state statute which undertook to confer jurisdiction upon the Department of Agriculture to establish minimum prices for fluid milk to be delivered or sold within Moffett Field, alleging (par. IV): "that said respondents and said Department of Agriculture have no control, authority or power over said contract with the Government of the United States; that their jurisdiction does not extend over any of the acts set forth in said complaint, but that said acts were all committed, to-wit, sales and delivery, within the exclusive jurisdiction of Federal Territory, to-wit, Moffett Field, over which the State of California, or Department of Agriculture has no sovereignty, and the acts of the respondents constitute a wrongful and unlawful interference with the administration of Moffett Field by the War Department of the Federal government and with the contracts thereof; that the proceedings set forth herein and all other proceedings of a punitive nature found in the Agricultural Code

are void and an unwarranted interference with the Federal government's exclusive jurisdiction over Moffett Field." It is also urged that the state statute violated Article I, § 8, par. 17, of the Constitution (par. VII), and that the threatened procedure looking toward the revocation of its license violated the due process clause of the Fourteenth Amendment to the Constitution of the United States in that the State of California lacked jurisdiction to punish a sale within a territory over which the United States had exclusive jurisdiction (par. IX).

The United States filed a brief *amicus curiae* specifically raising the question that the state statute was a direct interference with and placed a burden upon the United States in the exercise of its governmental functions, that it was intended to have such result, and was accordingly unconstitutional. The United States further contended that the state statute is inconsistent and conflicted with the Federal statutes requiring that Army supplies be procured through competitive bidding. R. S. 3709 (41 U. S. C. 5); Act of July 5, 1884, c. 217, 22 Stat. 106, 109; Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U. S. C. 1200-1201).

The Supreme Court of California passed squarely on the constitutional questions, 19 A. C. 885 (123 Pac. (2d) 442). In respect of the Due Process clause and the alleged interference with the exclusive jurisdiction of the United States, the court said:

> "* * * Petitioner contends that the State's control over activities within its jurisdiction affords it no authority to impose penalties because of transactions on Moffett Field. This contention proceeds from the theory that such penalties violate the due process clause of the 14th Amendment to the Constitution of the United States, denying to a State the power to restrict or control activities, persons, and property beyond its jurisdiction. * * * This contention,

> however, confuses the State's control over activities, persons, and property within its jurisdiction and the repercussions of that control in areas outside thereof. The question is not whether the State can prescribe the minimum prices at which milk may be sold on the territory within the exclusive jurisdiction of the United States, • • • but whether it has power to regulate acts within its jurisdiction even though they are followed in direct line of succession by a transaction outside its jurisdiction." (*id.* p. 890.)

The court concluded:

> "A state may exercise its power over things within its jurisdiction in the knowledge that it will thereby influence things beyond its jurisdiction, and its influence may be far reaching, so long as the external consequences remain incidental to the solution of internal problems." (*id.* p. 892.)

The court expressly rejected the contention of *amicus curiae* that the statute unlawfully interfered with the governmental functions of the United States. The court said (*id.* p. 897):

> "There remains the question whether the Milk Control Act can validly affect milk sold to instrumentalities of the United States • • •"

and answered its question by holding that

> "It is settled that such contracts are subject to state control, and that any consequent burden on the Federal Government is speculative and remote. • • • The very federal statutes requiring competitive bidding except cases 'where it is impracticable to secure competition' (10 U. S. C. sec. 1201), and Regulation 5-240 (g) of the United States Army provides that it is impracticable to secure such competition: '(3)

When the price is fixed by Federal, State, municipal, or other competent authority.' * * *"[1]

Finally, the court *sua sponte* raised the question of a possible conflict of the state statute with the "commerce clause" of the constitution. It held that the act did not violate the commerce clause, saying (p. 895) that "focused as it is upon a state problem, the state act, despite its repercussions upon interstate commerce, does not run counter to the commerce clause so long as it does not conflict with the provisions or objectives of Congressional legislation." In concluding that the state was not precluded by federal regulation the court stated (*id.* p. 896):

> "The absence of federal regulation may well be a recognition not only of the propriety but of the effectiveness of state regulation in the stabilization of a dominantly local industry, rather than ruling that there should be no regulation."

The constitutional questions decided by the Supreme Court of California are substantial and important. The United States, particularly at the present time, maintains and operates large numbers of camps, stations, posts and military fields of various characters. These posts, wherever located in the continental United States, are necessarily within the territorial limits of the various states and should the decision of the Supreme Court of California be allowed to stand, it would be possible for every State, by operating directly upon its citizens subject to its control in the area contiguous to such posts, to allow those posts to acquire

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[1] Regulation 5-240-(g) of the United States Army was not intended to have the effect ascribed to it by the court and was specifically amended by Procurement Circular No. 35 issued May 10, 1941. The amendment omitted subsection (3) quoted by the court. It is to be noted that the amended regulation was in effect not only at the time the court entered its opinion, but also at the time that Section 736.3(a)(6) was added to the Agricultural Code.

supplies only upon such terms as the State saw fit to permit.[2] Legislation seeking to control the price which the United States must pay distributors for fluid milk is in effect in a number of states. It is of the utmost importance to such distributors to learn if they must comply with minimum prices fixed by state boards in bidding upon federal supply contracts for milk.

The statute constitutes a deliberate attempt to regulate federal functions beyond the reach of valid state authority. Prior to the 1941 amendment which added Sec. 736.3(a)(6) to the Agricultural Code, no state statute undertook to fix prices within Federal enclaves and it was held that California had no power to do so. *Consolidated Milk Producers* v. *Parker*, 19 A. C. 898, 123 Pac. (2d) 440. On April 28, 1941, a Senate Joint Resolution was adopted by California memorializing the Congress of the United States to enact legislation requiring the Federal Government to comply with California's minimum price laws for milk. Calif. Stats. 1941, Concurrent and Joint Resolutions, c. 65, p. 3402. Congress having failed to respond favorably to the Joint Resolution, Section 736.3(a)(6) was added to the Agricultural Code which in effect provided that it was an unfair practice authorizing revocation of license for any licensed dealer to purchase, process and bottle milk for sale in a point outside the jurisdiction of California but within the outer, outside and external boundaries or limits of a marketing area. Obviously, only sales to the United

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[2] The Supreme Court of Pennsylvania has recently decided the case of *Penn Dairies, Inc., and the United States* v. *The Milk Control Commission*, Jan. Term 1942, Nos. 173 and 180, contrary to the contentions of the United States. That case presents the question of whether the price fixing provisions of the State of Pennsylvania are applicable to sales of milk to the United States Army. It also involves constitutional questions relating to the interference of those statutes with Federal undertakings and the Competitive Bidding Statutes.

States could be affected by such legislation, as indeed is conceded by the Supreme Court of California. It stated

> "The Federal territory within the State is so fragmented that there may be several federal islands within a single marketing area. If they are citadels of immunity from state jurisdiction, they are also exceptional segments in areas that are otherwise subject to that jurisdiction. They stand out like colored pins on the map of California, and range from military reservations to soldiers' homes, from court houses to penitentiaries, from Post Offices to Indian reservations, from national parks to regional dams." 19 A. C. at 894, 895.

It is clear, therefore, that the 1941 amendment was directed exclusively at the control of the price which the United States would be compelled to pay for fluid milk.

The constitutional infirmity of the statute seems clear. The states are without power to prescribe the conditions on which private citizens may contract with the Federal Government. Cf. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 867; *Crandall* v. *Nevada*, 6 Wall. 35, 44; *Arizona* v. *California*, 283 U. S. 423, 451-452; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 158; *Stewart Co.* v. *Sadracula*, 309 U. S. 94, 103-104. And the particular condition prescribed by the instant statute would seem to conflict with the Federal enactments requiring competitive bidding in letting the contracts for furnishing of supplies. R. S. 3709; Act of July 5, 1884, 22 Stat. 106, 109; Act of June 30, 1902, 32 Stat. 507, 514. Moreover, the states concededly may not directly prescribe regulations to govern a sale of milk on a Federal enclave within the exclusive jurisdiction of the Federal Government. *Standard Oil Company* v. *California*, 291 U. S. 242; *Arlington Hotel Company* v. *Fant*, 278 U. S. 429. They cannot, therefore, do so indirectly by prohibiting the "handling" of milk sold in disregard of

such regulations in a federal enclave. Cf. *Insurance Company* v. *Morse*, 21 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Terral* v. *Burke Construction Company*, 257 U. S. 527, 532, 533. Finally the decision that the statute is not invalid under the Commerce Clause is apparently in conflict with the decision of this Court in *Baldwin* v. *Seelig*, 294 U. S. 511. Commerce between a state and a Federal territory is commerce between the states within the meaning of the Commerce Clause. *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; *Stoutenburgh* v. *Hennick*, 129 U. S. 141.

The jurisdiction of the Supreme Court to review by direct appeal a final order of a state court in a mandamus action which determines the rights of the parties is clear. *Hartman* v. *Greenhow*, 102 U. S. 672, 675; *McPherson* v. *Blacker*, 146 U. S. 1, 23; *Detroit Railway* v. *Michigan R. R. Comm.*, 240 U. S. 564, 570-571; *Carroll* v. *Becker*, 285 U. S. 380. The following cases are believed to sustain the jurisdiction of the Supreme Court. *United States* v. *Klein*, 303 U. S. 276; *Nebbia* v. *New York*, 291 U. S. 502; *Johnson* v. *Maryland*, 254 U. S. 51.

There is appended hereto a copy of the opinion of the Supreme Court of California, entered March 12, 1942.

Respectfully submitted,

PACIFIC COAST DAIRY, INC.,
a Corporation,
By CAREY VAN FLEET,
VINCENT W. HALLINAN,
Attorneys.

UNITED STATES OF AMERICA,
By FRANK J. HENNESSY,
United States Attorney.

Amicus Curiae:
W. E. LEE KING,
Asst. U. S. Attorney.

Endorsed: Filed Mar. 12, 1942; B. Grant Taylor, Clerk, By S. C. S., S. F. Deputy,

APPENDIX "A".

In 1935 the California legislature passed an act regulating the marketing and distribution of fluid milk and fluid cream. (Cal. Agric. Code, div. 4, ch. 10, secs. 735-738.) The act declares that it is the policy of the state to promote the intelligent production and orderly marketing of such essential commodities as milk; that an adequate supply of wholesome milk is vital to the public health; that the production, transportation, processing, storage, distribution, and sale of milk and cream therefore constitute an industry affected with a public interest; and that unfair and destructive trade practices in the production, marketing, and distribution of milk and cream have menaced the public health by undermining sanitary regulations, which cannot of themselves guard against serious deterioration in the supply of milk. (Agric. Code, sec. 735.) It sets forth as one of its objectives the elimination of "speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers * * *"

The act as amended (Cal. Stats. 1937, ch. 3, 413, 710; Stats. 1941, ch. 1214) empowers the Director of Agriculture to set up defined marketing areas within the State, to prescribe minimum prices for fluid milk and fluid cream to be paid by distributors to producers in accordance with stabilization and marketing plans for such areas (secs. 735.4 (b) (4) (5) and 736.3 (b) (c)), to prescribe minimum wholesale and retail prices of fluid milk and fluid cream within each area (Agric. Code, secs. 736.11, 737.12), to license milk distributors within each area, to revoke or suspend licenses for violation of any stabilization and marketing plan, and to bring actions to enjoin such violations. (Agric. Code, sec. 737.7.)

The petitioner seeks a writ of mandamus ordering the Director of Agriculture to dismiss proceedings undertaken pursuant to section 737.11 of the Agricultural Code with

the object of revoking petitioner's license. In these proceedings it is alleged that petitioner violated section 737.3 (a) (6) of the code and of the Stabilization and Marketing Plan for the Santa Clara Marketing Area by purchasing, processing, bottling, transporting, and delivering in the Santa Clara Marketing Area fluid milk that it sold to the Federal Government for less than the minimum wholesale prices prescribed for that area. The sale occurred on Moffett Field, territory within the geographic boundaries of the Santa Clara Marketing Area, but subject to the exclusive jurisdiction of the federal government.

Since the demand for fluid milk fluctuates from day to day and cannot be anticipated exactly, the producers must supply enough milk to meet all reasonable needs; then any surplus, or "stand by," is converted into milk products and sold by the distributors at lower prices, with corresponding lower receipts for the producers. The possibility of a surplus has been a constant threat to the stability of prices paid to the producers, given the reluctance of distributors to pay the full price for milk that becomes in part converted into milk products. A stabilization plan counteracts this downward pull by establishing minimum prices for fluid milk. At the end of a given period, the distributor settles his accounts with the producer by paying him a "blended price" representing the price for fluid milk bought less the difference between that price and the price for the milk converted into milk products. Even then the producer does not know what the blended price will be until the expiration of the period for settling accounts. The minimum price of fluid milk, however, represents a fixed element in the blended price that affords him at least some protection against speculation at his expense in the distribution of milk. If the distributor were under no compulsion to pay a minimum price he would seek to shift to the producer the risk of speculation in a fluctuating market by paying him the lowest possible price, not only for fluid milk sold to consumers but for milk converted into milk products, and there would soon be adverse effects on standards of production.

The same adverse effects would result if the minimum price established by a stabilization plan were not uniformly

enforced. The act itself anticipates that possibility by specifying that there may be no departures from the minimum price even when the milk is sold to the federal government on territory within the exclusive jurisdiction of that government. Section 736.3 (a) provides that any stabilization and marketing plan shall prohibit distributors and retail stores from engaging in such unfair practices as:

"(7) The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

"(8) The purchasing or receiving of any fluid milk or fluid cream by distributors from producers within a marketing area wherein a stabilization and marketing plan is in effect for less than the minimum prices established in such plan, regardless of whether such milk or cream is subsequently sold or distributed within or without such marketing area, or within or without the jurisdiction of the State of California."

The validity of such provisions is clear. (*Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Alabama* v. *King and Boozer*, 62 Sup. Ct. 43; *James* v. *Dravo Contracting Co.*, 302 U. S. 134.)

In its original form in 1935 the milk control act prescribed minimum prices to the producers only. To prescribe such prices without also prescribing minimum resale prices is ineffectual, however, since the distributors cannot pay the producers the prescribed prices unless they have some guarantee of corresponding returns. Minimum resale prices, moreover, must govern all transactions, particularly those of the producer who is his own distributor and who is otherwise apt to sell to consumers at prices below those at which regular distributors are required to operate. In the light of these considerations, Article 2A was added in 1937 to provide for minimum wholesale and retail prices.

Section 736.11 provides that in all marketing areas where a stabilization and marketing plan is in effect the Director of Agriculture shall prescribe minimum wholesale prices at which milk shall be sold by distributors to retail stores, and minimum retail prices at which fluid milk shall be sold by distributors and retail stores to consumers. Section 736.12 provides that in determining minimum prices for any marketing area the director shall make an investigation relative to that area of such factors as the quantities of fluid milk distributed and normally required by consumers, the price to distributors and their handling costs, and the available capacity for processing and distributing. Section 736.13 prohibits sale by distributors at less than the prescribed prices.

The most real danger to the prescribed minimum lies in sales by distributors at lower prices on areas within the exclusive jurisdiction of the federal government, where transactions cannot be regulated by the State. Prescribed minimum prices fail of their purpose if they lie in the shadow of cut prices. The route of the milk from the producer to the consumer is a continuous one even when it crosses the imaginary line that demarcates federal jurisdiction, and the evil effects of substandard prices in the federal area course backward to play their part in undermining the intelligent production and orderly marketing that the State has declared essential to the public health. The State has therefore undertaken to regulate the milk industry within the bounds of its jurisdiction in such a manner as to obviate the elusive evils that it could not directly attack. Section 736.3 (a) (6) of the Agricultural Code provides that any stabilization and marketing plan shall prohibit distributors and retail stores from engaging in such unfair practices as;

"(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less

than the minimum wholesale and minimum retail prices effective in such marketing area."

The Stabilization and Marketing Plan for the Santa Clara Marketing Area contains the provisions outlined by this section. These regulations are directed at the milk before it can enter the stronghold of an area within the State's boundaries but outside its jurisdiction on terms that would menace the entire milk supply. The alleged violation in the present case is the purchasing, processing, bottling, transporting, delivering, and other handling of milk within the Santa Clara Marketing Area for prospective sale at a point outside the jurisdiction of the State at prices less than the minimum prescribed for that marketing area. Petitioner contends that the State's control over activities within its jurisdiction affords it no authority to impose penalties because of transactions on Moffett Field. This contention proceeds from the theory that such penalties violate the due process clause of the 14th Amendment to the Constitution of the United States, denying to a State the power to restrict or control activities, persons, and property beyond its jurisdiction. (*Standard Oil Co. of California* v. *California*, 291 U. S. 242; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346; *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 275 U. S. 587; *Home Ins. Co.* v. *Dick*, 281 U. S. 397. This contention, however, confuses the State's control over activities, persons, and property within its jurisdiction and the repercussions of that control in areas outside thereof. The question is not whether the State can prescribe the minimum prices at which milk may be sold on the territory within the exclusive jurisdiction of the United States (*Cf. Consolidated Milk Producers* v. *Parker*, this day decided), but whether it has power to regulate acts within its jurisdiction even though they are followed in direct line of succession by a transaction outside its jurisdiction.

It is established that a State may validly regulate activities, persons, and property within its jurisdiction, even though extra-territorial repercussions ensue, whenever such

regulation is vital to the welfare of its inhabitants. The propriety of the regulation is determined by its focus upon an internal problem and not by the range of its influence. Thus, in *Mirkovitch* v. *Milnor*, 34 Fed. Supp. 409, the court held that the State could exercise its police power over boats within State waters in a manner that was bound to affect their activities beyond State borders. Threatened with the depletion of its fish supply by the practices of certain fishermen, California provided in the Fish and Game Code that no person shall use a boat in this State or its waters that delivers to any point outside the State fish caught from the boat in the waters of the Pacific Ocean within the State or on the high seas or elsewhere without authorization of the Fish and Game Commission. The court pointed out that the code provision related solely to the operation within State waters of fishing vessels delivering their catch outside the State, and emphasized that the provision was designed not to regulate fishing operations beyond the State's jurisdiction but to protect the State's fisheries from depletion. The realization that the plaintiff might be unable to carry on fishing operations beyond the State's jurisdiction without entering and operating his boat within State waters did not deter the court from declaring that the statute was a valid exercise of the State's police power over acts within its jurisdiction.

In *Osborn* v. *Ozlin*, 310 U. S. 53, the United States Supreme Court upheld a Virginia statute requiring that insurance policies for persons or property in Virginia written by companies authorized to do business in Virginia be countersigned by a local agent receiving a certain percentage of the commission, even though insurer and insured are both outside of Virginia when the contract of insurance is negotiated. The close relation between the insurance contracts and the insured persons or property, together with the State's interest in protecting such persons and property, justified the regulation despite its extra-territorial effect. The court stated: "But the question is not whether what Virginia has done will restrict appellant's freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that State ac-

tion may have repercussions beyond State lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. * * * Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it." (Pages 62-63.) (See, also, *Holmes* v. *Springfield Fire & Marine Insur. Co.*, 51 Sup. Ct. 19; 32 Fed. Supp. 964; *National Fire Ins. Co.* v. *Wanberg*, 260 U. S. 71, and *Palmetto Fire Ins. Co.* v. *Conn.*, 272 U. S. 295. Brandeis's dissent in *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357, 377; *cf. Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426.)

Again in the application of State workmen's compensation laws, it is established that where the injury occurs in one state and the contract of employment is entered into in another, the statute of the state with the greater interest in the welfare of the injured workman controls. (*Alaska Packers Assn.* v. *Industrial Acc. Com. of California*, 294 U. S. 532; *Pacific Employers Ins. Co.* v. *Industrial Acc. Com. of California*, 10 Cal. (2d) 567). In the Alaska Packers case the California Workmen's Compensation Act was held applicable to an injury sustained in Alaska by a workman who resided in California and entered into the contract of employment here. The court noted California's interest in the welfare of the injured workman, stating: "Obviously the power of a state to effect legal consequences is not limited to occurrences within the state, if it has control over the status which gives rise to those consequences." (Page 541.) (See, also, *J. C. Penney Co.* v. *Wisconsin Tax Com.*, 311 U. S. 435; *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412; *Nelson* v. *Sears Roebuck Co.*, 61 Sup. Ct. 586.)

The foregoing cases establish that a State may exercise its power over things within its jurisdiction in the knowledge that it will thereby influence things beyond its

jurisdiction, and that its influence may be far reaching, so long as the external consequences remain incidental to the solution of internal problems. Their application to the present case is clear. In accomplishing the objectives of the State Milk Control Act the State is concerned, not with the destination and sale of the milk but with the effect of the price of the milk upon the conditions of production. A price below the fixed minimum for milk produced in the State endangers those established standards for the milk industry that safeguard the public health, and leads successively to a breakdown of the law, price cutting, diminishing returns to the producers, inferior standards of milk production and finally injurious effects on the public health. The State has regulated the purchasing, processing, bottling, transporting and handling of fluid milk within its jurisdiction with the object, not of controlling transactions beyond its jurisdiction, but of stabilizing within its jurisdiction the production of a commodity vital to the public health.

The State Milk Control Act, however clear its validity under the due process clause, must be scrutinized further in the light of the commerce clause and the Federal Agricultural Marketing Agreement Act of 1937 (50 U. S. Stats. 246), held constitutional in *United States* v. *Rock Royal Co-op.*, 301 U. S. 533. The federal act authorizes the Secretary of Agriculture to enter into marketing agreements fixing minimum prices to be paid producers for milk that is "in the current of interstate or foreign commerce" or that "directly burdens, obstructs or affects interstate or foreign commerce." (Secs. 8 (c) (1), (2), (5), (7), (8), and (18). It defines interstate or foreign commerce as "commerce between any State, Territory or possession, or the District of Columbia, but through any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory, or possession, or the District of Columbia. For the purpose of this chapter • • • a marketing transaction in respect to an agricultural commodity or product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign com-

merce usual in the handling of the commodity or product whereby they or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. • • • As used herein, the word 'State' includes Territory, the District of Columbia, possessions of the United States, and foreign nations." (Sec. 10(j).) The extensiveness of this definition leaves no doubt that Congress intended to cover the broadest possible field that might come within its powers to regulate interstate commerce and to govern territories.

The shipments of milk from California to such areas as Moffett Field, where the transit ends, fall within this definition of interstate commerce, for Moffett Field can be classified as either a territory or possession of the United States outside the jurisdiction of California, even though within the State's boundaries.

The contention is nevertheless advanced that transactions between such federal areas as Moffett Field and the rest of the State do not come within the power of Congress to regulate interstate commerce, because such areas do not fall within the categories of States, foreign nations, or Indian tribes set forth in the commerce clause. The judicial interpretation of the commerce clause, however, has greatly amplified the meaning of interstate commerce. Thus, commerce between States and territories has long been recognized as interstate commerce. (*Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; *Inter-Island Steam Navigation Co.* v. *Hawaii*, 92 Fed. (2d) 412, aff'd 305 U. S. 306.) Commerce between States and the District of Columbia is similarly recognized as interstate commerce. (*Stoutenburgh* v. *Hennick*, 129 U. S. 141; *Galloway* v. *Bell*, 11 Fed. (2d) 558.) Such areas as Moffett Field are in the same category as the District of Columbia, for the same power of Congress extends over them both. (U. S. Const., Art. I, sec. 8, cl. 17; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525.) In the light of the foregoing cases it is clear that the power of

Congress to regulate interstate commerce, reinforced by its authority over territories and "forts, magazines, arsenals, dockyards and other needful buildings" enables it to regulate commerce between States and such areas as Moffett Field. (Compare *People* v. *Standard Oil Co.*, 218 Cal. 123; *Grayburg Oil Co.* v. *State*, 286 S. W. 789; *Grayburg Oil Co.* v. *State*, 3 S. W. (2d) 427, and *McKesson & Robbins* v. *Collins*, 18 Cal. App. 648, which did not involve any federal statute regulating such commerce.)

The milk industry in California is dominantly a local one. Only a small percentage of the milk produced goes beyond the jurisdiction of the State, but whatever the destination of the milk, the State is vitally concerned with the stabilization of the industry, and particularly with standards of production, in the State as a whole. The federal territory within the State is so fragmented that there may be several federal islands within a single marketing area. If they are citadels of immunity from State jurisdiction, they are also exceptional segments in areas that are otherwise subject to that jurisdiction. They stand out like colored pins on the map of California, and range from military reservations to soldiers' homes, from court houses to penitentiaries, from post offices to Indian reservations, from national parks to regional dams. (See cases cited in 38 Columbia L. Rev. 128, at 130.) The commerce between them and the rest of the State is of the greatest interest to the State regardless of the circumstance that it may be regulated by the federal government. Focussed as it is upon a State problem, the State act, despite its repercussions upon interstate commerce, does not run counter to the commerce clause so long as it does not conflict with the provisions or objectives of Congressional legislation. (*Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Duckworth* v. *Arkansas*, 62 Sup. Ct. 311; *California* v. *Thompson*, 313 U. S. 109; *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177. See 27 Cal. L. Rev. 615.)

The objectives of the federal act in fixing the minimum price payable by the distributor to the producer are the same as those of the California act, namely, to insure to

the producer a reasonable return on his products (secs. 1 and 2), and to the consumer a "sufficient quantity of pure and wholesome milk." (Sec. 8 (c) (18).) There is no federal marketing agreement or order with respect to the milk industry, however, now in effect in this State. Where a conflict is apparent the State legislation must yield. (*United States* v. *Wrightwood Dairy Co.*, 62 Sup. Ct. 523; *Cloverleaf Butter Co.* v. *Patterson*, 62 Sup. Ct. 491.) There is a question, however, whether any conflict exists when a federal administrative officer is empowered to prescribe regulations in a field already regulated by a State but does not actually do so. The United States Supreme Court has held in some cases that a conflict of authority is inherent in such a situation by interpreting the failure of the federal officer to make any regulation as in effect a ruling that neither federal nor State regulation is necessary. (*Oregon-Washington R. R. Co.* v. *Washington*, 270 U. S. 87; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605.) There is a growing tendency on the part of the court, however, to emphasize the evils arising from the absence of any regulation, and to hold therefore that the existence of an unexercised superior federal authority does not rule out State regulation vital to the public welfare. This realistic view germinated in cases upholding State regulation of certain public utility practices that the Interstate Commerce Commission did not regulate although it had authority to do so. (*Northwestern Bell Telephone Co.* v. *Ry. Commission*, 297 U. S. 471; *Missouri Pacific Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612.) The court has balanced, not the State regulation against the unexercised federal authority, but the importance of the State's objectives against the effects of its regulation on interstate commerce. It has rejected the theory that the failure of a federal administrative agency to exercise its authority necessarily amounts to a declaration against all regulation. Indeed, in *H. P. Welsh Co.* v. *New Hampshire*, 306 U. S. 79, it demonstrated its concern with keeping the State regulation alive in the absence of immediate conflict with federal regulation. It upheld in that case the application of a state act regulating the hours of drivers of motor carriers to a driver transport-

ing an interstate shipment, even though the Interstate Commerce Commission had overlapping authority and had issued regulations that would conflict with the state act when they became effective two years later. The court took the view that the safety of the people should not wait upon federal administrative action. (See, also, *Kelly* v. *Washington*, 302 U. S. 1; *South Carolina State Highway Dept.* v. *Barnwell Bros., supra; Eichholz* v. *Commission*, 306 U. S. 268; *Maurer* v. *Hamilton*, 309 U. S. 598; *Mintz* v. *Baldwin*, 289 U. S. 346.)

Public health, like public safety, is a vital concern of the State, and its maintenance at proper levels should likewise not wait upon federal regulation. Toward that maintenance the California Milk Control Act contributes largely, but it might well be disrupted if those engaged in interstate commerce escaped the State regulation while they were untouched by corresponding federal regulation. The absence of federal regulation may well be a recognition not only of the propriety but of the effectiveness of State regulation in the stabilization of a dominantly local industry, rather than a ruling that there should be no regulation.

There remains the question whether the Milk Control Act can validly affect milk sold to instrumentalities of the United States. In a brief filed as *amicus curiae* on behalf of the United States, the United States Attorney contends that the application of the State act to such milk would unduly burden the operation of an essential federal agency, and that it is inconsistent with the federal statutes requiring that army supplies be secured through competitive bidding. (41 U. S. C., sec. 5; 10 U. S. C., secs. 1200-1201.) Federal agencies, however, cannot entirely escape the effects of State legislation. The California Milk Control Act does not discriminate against the United States army nor substantially hinder its efficient operation. The army is not precluded from obtaining milk, nor required to pay more for such milk than other consumers in the same area. The act regulates not the army but the distributors who are independent contractors with the federal government. It is settled that such contractors are subject to State control, and that any consequent burden

on the federal government is speculative and remote. (*Milk Control Board* v. *Gozzelin's Dairy, Inc.*, 16 N. E. (2d) 641; *Paterson Milk & Cream Co., Inc.* v. *Milk Control Board*, 118 N. J. L. 383; *Alabama* v. *King & Boozer*, 62 Sup. Ct. 43; *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Atkinson* v. *State Tax Com. of Oregon*, 303 U. S. 66; *Van Cott* v. *Utah*, 306 U. S. 511; *Helvering* v. *Gerhardt*, 299 U. S. 437; *Trinity Farm Const. Co.* v. *Grosjean*, 291 U. S. 466; see 27 Cal. L. Rev. 327.) The very federal statutes requiring competitive bidding except cases "where it is impracticable to secure competition" (10 U. S. C. sec. 1201), and Regulation 5-240 (g) of the United States Army provides that it is impracticable to secure such competition: "(3) When the price is fixed by Federal, State, municipal, or other competent authority." (*Penn Dairies, Inc.* v. *Milk Control Commission*, (March 25, 1941) Court of Common Pleas of Lancaster County, Pennsylvania; *Commonwealth* v. *Rohrer* (Pa.), 37 D. & C. 410.)

The alternative writ of mandamus is discharged and the petition for a peremptory writ is denied.

TRAYNOR, *J.*

We concur:

GIBSON, *C. J.*
CURTIS, *J.*
SHENK, *J.*
HOUSER, *J.*
EDMONDS, *J.*
CARTER, *J.*

JAN 11 1943
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 275.

PACIFIC COAST DAIRY, INC., a corporation,

Appellant,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; WILLIAM J. CECIL, Director of Agriculture of the State of California; BUREAU OF MARKET ENFORCEMENT OF THE STATE OF CALIFORNIA; C. J. CAREY, Chief; E. E. BROWN, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California,

Appellees.

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SUBJECT INDEX.

PAGE

Opinion below 1

Jurisdictional statement 2

Preliminary Statement 2

Statement of the case 2

The statute in question 3

Provision of the statute and of the stabilization and marketing plan involved herein 3

Departmental proceedings 4

Petition for writ of mandate 6

The issue involved 9

Summary of argument 10

Argument 14

I.

Judgment sought to be reviewed is final within section 237 of Judicial Code 14

II.

Constitutionality of California Milk Control Law 19

III.

Subdivision (6) of section 736.3(a) is a valid exercise of police power of state 20

A. Immunity of federal government 23

B. Purpose of state statute 29

C. A state may, etc 42

D. The only (cost burden) 51

E. The state statute (bidding) 56

IV.

Interstate commerce 59

Conclusion 62

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Alabama v. King and Boozer, 314 U. S. 1, 62 S. C. 43, 86 L. Ed. 1 ..... 12, 25, 28, 51, 55
Alaska Packers Assn. v. Ind. Acc. Comm., 294 U. S. 532, 55 S. C. 518, 79 L. Ed. 1044 ..... 11, 46
Albert v. Milk Control Board, 210 Ind. 283, 200 N. E. 688 19
Allen-Bradley Local 1111 v. Wisconsin Emp. Rel. Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 802 ..... 13, 41
Alward v. Johnson, 282 U. S. 509, 51 S. Ct. 273, 75 L. ed. 496 26
American Express Co. v. Michigan, 177 U. S. 404, 406, 20 S. Ct. 695, 44 L. ed. 823 15
Ashwander v. Valley Authority, 297 U. S. 288 60
Baltimore & A. R. Co. v. Lichtenberg, 176 Md. 383, 4 Atl. (2d) 734 51
Bandini Petroleum Co. v. Superior Court, Los Angeles County, Cal., 284 U. S. 8, 14, 52 S. Ct. 103, 76 L. ed. 136, 78 A. L. R. 826 ..... 16, 17, 18
Bayside Fish Co. v. Gentry, 297 U. S. 422 44
Bogg v. Jordan, 204 Cal. 207, 267 P. 696 15
Bohannon v. Duncan, 185 Ga. 840, 196 S. E. 897 19
Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669 19
Carroll v. Becker, 285 U. S. 380, 52 S. Ct. 402, 76 L. ed. 807 15
Central Transportation Co. v. Pullman Co., 139 U. S. 24, 40, 11 S. Ct. 478, 35 L. ed. 55 15
Collector v. Day, 11 Wall. 113, 20 L. ed. 122 24
Consolidated Milk Producers v. Parker, 19 Cal. (2d) 815, 123 Pac. (2d) 440 ..... 21, 22, 32
Curry v. United States, 62 S. C. R. 48 55
Davies v. Corbin, 112 U. S. 36, 40, 5 S. Ct. 4, 28 L. ed. 627 15
Denver & Rio Grande W. R. Co. v. Terte, 284 U. S. 284, 285, 52 S. Ct. 152, 76 L. ed. 295 16

PAGE

Detroit etc. Ry. Co. v. Michigan R. R. Comm., 240 U. S. 564, 571, 36 S. Ct. 424, 60 L. Ed. 802 15

Dufton v. Daniels, 190 Cal. 577, 213 Pac. 949 14

Fidelity and Deposit Co. v. Tofoya, 270 U. S. 426 40

Franklin v. State, 232 Ala. 637, 169 So. 295 19

Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 489, 59 S. Ct. 595 ..... 23, 24

Grayburg Oil Co. v. State, ... Tex. ....., 3 S. W. (2d) 427 13

Grayburg Oil Co. v. State, ... Tex. ....., 286 S. W. 489 13

Grays Harbor Logging Co. v. Coats Fordney Logging Co., 243, 251, 37 S. Ct. 295, 61 L. ed. 702 ..... 17, 18

Hartman v. Greenlaw, 102 U. S. 672, 26 L. ed. 271 15

Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 55 S. Ct. 7, 79 L. ed. 259 19

Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427 24

Highland Farms Dairy v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. ed. 835 19

Holmes v. Jennison, 14 Pet. 540, 563, 614, 10 L. ed. 579 16

Hunt v. United States, 278 U. S. 96, 49 S. Ct. 38, 73 L. ed. 200 23

Hyatt v. Allen, 54 Cal. 353 14

James v. Dravo Contracting Co., 302 U. S. 134, 58 S. C. 208, 82 L. Ed. 155, 114 A. L. R. 318 ..... 12, 24, 28, 29, 51, 55

James Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 S. C. 431, 84 L. Ed. 596 ..... 12, 51, 56

Jersey Maid Milk Products Co. v. Brock, 13 Cal. (2d) 620, 91 Pac. (2d) 577 ..... 3, 19

Johnson v. Maryland, 254 U. S. 51, 41 S. Ct. 16, 65 L. ed. 126 ..... 23, 26, 27

Johnson v. Mich. Milk Marketing Board, 295 Mich. 644, 295 N. W. 346 19

Johnson v. Simonton, 43 Cal. 242 41

PAGE

Kelly v. Washington, 302 U. S. 1, 58 S. C. 87, 82 L. Ed. 3..... 13

McCulloch v. Maryland, 4 Wheat. 316.....23, 24

McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869.... 15

Metcalf & Eddy v. Mitchell, 269 U. S. 514, 524-5, 46 S. Ct. 172, 175, 70 L. ed. 384..... 27

Miami etc. v. Milk Control Board, 124 Fla. 797, 169 So. 541.... 19

Michigan Central R. Co. v. Mix, 278 U. S. 492, 494, 49 S. Ct. 207, 73 L. ed. 470..... 16

Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. ed. 752..... 19

Milk Control Board v. Gosselin's Dairy, 301 Mass. 174, 16 N. E. (2d) 641.....12, 19, 49

Mirkovitch v. Milnor, 34 Fed. Supp. 409..... 42

Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 266 U. S. 200, 206, 45 S. Ct. 47, 69 L. ed. 247, 42 A. L. R. 1232..... 16

Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U. S. 30, 36 S. Ct. 234, 60 L. ed. 507.....15, 16

Nebbia v. New York, 291 U. S. 502, 54 S. C. 505, 78 L. Ed. 940 .....11, 19, 29, 41, 47

Norris v. Boston, 4 Metc. 282..... 36

Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699 .....23, 25

Osborn v. Ozlin, 310 U. S. 53, 60 S. C. 758, 84 L. Ed. 1074..... .....11, 36, 47

Osborn v. U. S. Bank, 9 Wheat. 738.....23, 24

Pacific Coast Dairy, Inc. v. Department of Agriculture of the State of California et al., 19 Cal. (2d) 818, 123 Pac. (2d) 442 1

Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 224-5, 48 S. Ct. 451, 453-4, 72 L. ed. 857.....27, 28, 29

Parker v. Brown, No. 46 this term, decided January 4, 1943..... 61

PAGE

Paterson Milk & Cream Co. v. Milk Control Board, 118 N. J. Law. 383, 192 Atl. 838 ..... 12, 51

People v. Standard Oil Co., 218 Cal. 123, 22 Pac. (2d) 2 13

People v. State of New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 70, 49 S. Ct. 61, 73 L. ed. 184, 62 A. L. R. 785 16

Ray v. Parker, 15 Cal. (2d) 275, 101 Pac. (2d) 665 ..... 3, 10, 19

Reynolds v. Milk Commission, 163 Va. 957, 179 S. E. 507 19

Rohrer v. Milk Control Board, 322 Pa. 257, 186 Atl. 336 19

Santa Cruz etc. Stock Co. v. Board of Supervisors, 3 Cal. 40 14

Savage v. Martin, 161 Ore. 660, 91 Pac. (2d) 273 19

Scott v. Boyle, 164 Cal. 321 14

Sheehan v. Board of Police Commissioners, 188 Cal. 525, 206 P. 70 15

Simpson v. Shepard, 230 U. S. 352 42

Skiriotes v. Florida, 313 U. S. 69, 61 S. Ct. 924, 85 L. ed. 1183 45

Standard Oil v. California, 291 U. S. 242 22

State v. Acclair, 110 Vt. 147, 4 Atl. (2d) 107 19

State v. Lincoln Dairy, 221 Wis. 1, 265 N. W. 197 19

State v. Newark Milk Co., 118 N. J. Eq. 504, 179 Atl. 116 19

South Carolina v. Barnwell, 303 U. S. 177, 58 S. Ct. 510 25

United Milk Producers v. Cecil, 47 Cal. App. (2d) 758, 118 Pac. (2d) 830 11

United States v. Baltimore & Annapolis R. R., 308 U. S. 525, 60 S. Ct. 297, 84 L. ed. 51

United States v. Brookridge Farm, Inc. (10 Cir.), 111 F. (2d) 461 57

United States v. Rock Royal Co-op., 307 U. S. 533, 83 L. ed. 1440, 59 S. Ct. 993 19

United States v. Wrightwood Dairy Co., 315 U. S. 110, 86 L. ed. 431, 62 S. Ct. 523 19

PAGE

Weston v. Charleston, 2 Pet. 449 15

Wick v. Superior Court, 278 U. S. 575, 49 S. Ct. 94, 73 L. ed. 514 (memo. dec.) 17, 18

Willing, In re, 12 Cal. (2d) 591, 86 Pac. (2d) 663 10

STATUTES.

Agricultural Marketing Agreement Act of 1937 (50 U. S. Stats. 246) 13, 59

California Act of Cession (Cal. Stats. 1897, p. 51) 7

California Agricultural Code, Chap. 10, Div. IV 3

California Agricultural Code, Sec. 736.3 50

California Agricultural Code, Sec. 736.3(a), Sub. (6) 3, 4, 9, 10, 11, 32, 34

California Agricultural Code, Sec. 736.3(a), Sub. (7) 4, 32, 34

..... 4, 32, 34

California Agricultural Code, Sec. 736.3(a), Sub. (8) 4, 32, 35

..... 4, 32, 35

California Agricultural Code, Sec. 737.5(b), pp. 24-5 30

California Agricultural Code, Sec. 737.11 ..... 2, 6

California Constitution, Article VI, Sec. 2 14

California Constitution, Art. VI, Sec. 4 14

California Judicial Code, Sec. 237 ..... 10, 14, 15, 18

California Supreme Court, Rule XXX (printed in 18 Cal. 2d 1, at page 23) 14

Political Code, Sec. 34 7

Statutes of 1935, Chap. 241 3

Statutes of 1941, Chap. 65, p. 3402 33

Statutes of 1941, Chap. 1214, p. 3008 ..... 3, 33

United States Code, Annotated, Title 7, Sec. 608c(5) 35

United States Constitution, Art. I, Sec. 8, Clause 17 7

INDEX TO APPENDICES.

PAGE

Appendix "A"—Extracts from the Agricultural Code of California 93

Appendix "B"—Chapter 65, Statutes of 1941, Senate Joint Resolution No. 17 93

Appendix "C"—Santa Clara County Order Number Two (2) of the Director of Agriculture declaring in effect schedules of minimum wholesale and minimum retail prices for fluid milk, as amended, together with rules and regulations pertaining thereto, for the Santa Clara county marketing area, as modified 99

Appendix "D"—Report by the Bureau of Markets regarding the method used to determine the cost of distributing fluid milk to agencies of the federal government for the Santa Clara county marketing area 109

Appendix "E"—Memorandum of federal acts applicable to interstate commerce 113

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 275.

PACIFIC COAST DAIRY, INC., a corporation,

Appellant,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; WILLIAM J. CECIL, Director of Agriculture of the State of California; BUREAU OF MARKET ENFORCEMENT OF THE STATE OF CALIFORNIA; C. J. CAREY, Chief; E. E. BROWN, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California,

Appellees.

BRIEF FOR APPELLEES.

Opinion Below.

The official report of the opinion of the Supreme Court of the State of California, the court from which the appeal is taken in this proceeding, is found in *Pacific Coast Dairy, Inc. v. Department of Agriculture of the State of California, et al.,* 19 Cal. (2d) 818, 123 Pac. (2d) 442, and is set forth in the Transcript of Record, pages 14 to 26, inclusive.

Jurisdictional Statement.

The judgment of the Supreme Court of California was entered March 12, 1942, [R. 14.] The appeal was taken June 4, 1942 [R. 26] and allowed the same day. [R. 28.]

A Statement as to Jurisdiction was filed herein setting forth the grounds on which the jurisdiction of this Court is invoked, and on October 12, 1942, further consideration of the question of the jurisdiction of this Court in this case was postponed to the hearing of the case on the merits. [R. 31.]

Preliminary Statement.

As up to the time of printing this brief (January 4, 1943) no brief has been served or filed by appellant, appellees are perforce confined to answering the Assignment of Errors [R. 27] and Points Relied On [R. 30], as filed herein by appellant, without benefit of its argument in support thereof.

Statement of the Case.

Pacific Coast Dairy, Inc., petitioner in the State court (appellant herein) a distributor of fluid milk licensed by the State of California, sought a writ of mandate in the State Supreme Court directing the respondents, as officials of the State of California, to dismiss certain departmental proceedings undertaken pursuant to section 737.11[1] of the Agricultural Code of the State of California with the object of revoking petitioner's license as a milk distributor.

The State Supreme Court issued an alternative writ of mandate directing respondents to vacate said order to

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[1]Appendix A, p. 28.

show cause and to dismiss the departmental proceedings or show cause why they had not done so.

The Return of respondents to the alternative writ consisted of a general demurrer alleging that the petition did not state facts sufficient to constitute a cause of action to entitle petitioner to the relief prayed for or to any relief. The State Court discharged the alternative writ and denied a peremptory writ of mandate.

The Statute in Question.

The statute in question, Chapter 10, Division IV of the Agricultural Code of the State of California, sometimes designated as the California Milk Control Law, is set forth in full as Appendix "A" to this brief.

The original act became effective June 1, 1935 (Stats. 1935, Ch. 241). It has been amended at subsequent sessions of the Legislature to and including 1941. The statute, itself, has been held constitutional (*Jersey Maid Milk Products Co. v. Brock*, 13 Cal. (2d) 620, 91 Pac. (2d) 577; *Ray v. Parker*, 15 Cal. (2d) 275, 101 Pac. (2d) 665), and its validity as a whole is not here attacked by appellant.

The Provision of the Statute and of the Stabilization and Marketing Plan Involved Herein.

Subdivision (6) of section 736.3(a) of the Agricultural Code added by amendment in Stats. 1941, Chap. 1214, page 3008, at page 3012, provides as follows:

> "Any stabilization and marketing plan shall contain the following provisions:
>
> (a) Provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:
>
> * * * * * * * *

(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

This provision, which in accordance with the terms of the statute was incorporated in the stabilization and marketing plan for the Santa Clara County Marketing Area, was the basis of the departmental proceedings for revocation of petitioner's license and is the provision the validity of which is directly challenged by appellant in this proceeding.

Section 736.3(a) also contains various other prohibited unfair practices, among which we direct attention to subdivisions (a) (7)[2] and (a) (8),[3] which are quoted in the opinion of the State Supreme Court.

Departmental Proceedings.

The departmental proceedings heretofore mentioned were initiated on November 5, 1941, by the filing of a verified complaint with the Director of Agriculture alleging facts claimed to constitute a violation of the aforesaid terms and provisions of the statute and of the stabilization and marketing plan for fluid milk in effect in the Santa Clara County Marketing Area.

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[2]Appendix A. p. 14.
[3]*Ibid.*, p. 14.

The verified complaint upon which the departmental proceedings were commenced was made a part of the petition for writ of mandate herein (Exhibit B thereof). [R. 7-10.]

It alleges that Pacific Coast Dairy, Inc. (appellant herein) is a licensed distributor of fluid milk; that General Order No. 98 of the Director of Agriculture created and described the Santa Clara County Marketing Area; that a stabilization and marketing plan is in effect in the Santa Clara County Marketing Area; that schedules of minimum wholesale and minimum retail prices for fluid milk are also in effect in the Santa Clara County Marketing Area; that Moffett Field is located in Santa Clara County at Mountain View, about thirty-five miles southeast of San Francisco, California, and is situated in the geographical area within the outer, outside and external boundaries or limits of the Santa Clara County Marketing Area; that on October 15, 1941, said Pacific Coast Dairy, Inc. entered into a contract with the War Department of the Federal Government, signed by the Quartermaster's Department of Moffett Field, whereby it agreed to deliver and sell to said War Department fluid milk for $0.025 per half pint, which price is less than the minimum wholesale price established for fluid milk in half pint containers in said Santa Clara County Marketing Area; that on or about November 1, 1941, said Pacific Coast Dairy, Inc. did purchase, process, bottle, transport and deliver fluid milk in the Santa Clara County Marketing Area, which milk was sold or disposed of by it in accordance with the above mentioned contract, at less than the minimum wholesale price effective in the Santa Clara County Marketing Area to the Federal Government at Moffett Field. [R. 10.]

Upon the filing of said verified complaint on November 5, 1941, the Director of Agriculture took action in accordance with section 737.11 of the Agricultural Code and issued a departmental order for said Pacific Coast Dairy, Inc. (appellant herein) to show cause why its license as a distributor of fluid milk should not be suspended or revoked because of the alleged violation of said unfair practice provisions of the statute and of the stabilization and marketing plan.

At this point petitioner (appellant herein) filed its petition in the State Supreme Court for writ of mandate to prevent further action in the proceeding thus pending before the Department of Agriculture.

Petition for Writ of Mandate.

The petition for writ of mandate does not controvert any of the allegations of fact set forth in the verified complaint filed with the Department of Agriculture; and appellant concedes that it purchased, processed, bottled, handled and transported in the Santa Clara County Marketing Area the milk which it sold at Moffett Field. [R. 1-10.]

It expressly admits the contract between petitioner and the War Department to deliver and sell fluid milk at a price less than the minimum wholesale price for such milk established in the Santa Clara County Marketing Area, but alleges that the delivery and sale of such milk took place within the exclusive jurisdiction of federal territory, to wit, Moffett Field. [R. 2.]

The petition further alleges in substance that more than fifteen years ago Moffett Field was purchased[4] by the Government of the United States for erecting forts, magazines, arsenals, dockyards and other needful buildings pursuant to Article I, section VIII, paragraph 17, of the Federal Constitution[5] and section 34 of the Political Code

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[4]Article I, section 8, clause 17, of the United States Constitution provides:

> "To exercise exclusive Legislation * * * over all Places *purchased* by the Consent of the Legislature of the State * * *." (Italics supplied.)

Moffet Field was not acquired by purchase. The Act authorizing its acquisition (46 Stat. 1092, ch. 122) provides:

> "That the Secretary of the Navy is hereby authorized to accept on behalf of the United States, free from encumbrance *and without cost to the United States*, a title in fee simple to such lands as he may deem necessary or desirable near Sunnyvale, in the county of Santa Clara, State of California * * *." (Italics supplied.)

Therefore, it is questionable whether the authority of the Federal Government over this area is determined by Article I, section 8, clause 17, of the United States Constitution or by the California Act of Cession (Cal. Stats. 1897, p. 51), which provides:

> "The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; * * *."

[5]Article I, section VIII, paragraph 17, Federal Constitution:

> "To exercise exclusive Legislation in all Cases Whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-yards, and other needful Buildings;—"

of California,[6] and that the Government of the United States still occupies Moffett Field and uses it for the same purposes; that by reason thereof the State has no jurisdiction in the premises and that enforcement of the statute would result in deprivation of property without due process of law in violation of the Fourteenth Amendment. [R. 4-5.]

Respondents (appellees herein) concede that Moffett Field has been at all times herein mentioned a federal enclave subject to the exclusive jurisdiction of the Federal Government.

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[6]Section 34, Political Code of California:

"The legislature consents to the purchase or condemnation by the United States of any tract of land within this state for the purpose of erecting forts, magazines, arsenals, dock-yards, and other needful buildings, upon the express condition that all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made."

The Issue Involved.

The issue raised by appellant is whether subdivision (6) of section 736.3(a) of the California Agricultural Code is an unconstitutional attempt of the State to extend its power into territory exclusively under the federal jurisdiction.

The State Supreme Court said [R. 19]:

> "The question is not whether the State can prescribe the minimum prices at which milk may be sold on the territory within the exclusive jurisdiction of the United States (Cf. Consolidated Milk Producers v. Parker, 19 Cal. (2d) 815, 123 Pac. (2d) 440), but whether it has power to regulate acts within its jurisdiction even though they are followed in direct line of succession by a transaction outside its jurisdiction."

More specifically,—is the State denied the power to prohibit its licensed distributors from purchasing, processing, bottling, transporting and handling within its jurisdiction fluid milk when such milk is sold for less than the minimum price prescribed for the area where such purchasing, processing, etc., occurs, merely because such sale is made in a federal enclave situated within the geographical boundaries of the marketing area?

Summary of Argument.

1. The judgment sought to be reviewed is a final judgment within the meaning of section 237 of the Judicial Code. The ultimate issue in this mandamus proceeding is whether the State Department of Agriculture has jurisdiction of the proceedings instituted before it to enforce against appellant the provisions of subdivision (6) of section 736.3(a) of the California Agricultural Code. That question was finally disposed of by the State Court. It is settled that a judgment awarding or refusing a writ of mandamus is a final judgment within the meaning of said section 237.

2. The California Milk Control Law is a valid and constitutional exercise of the police power of the state in the interest of the public and for the protection of the health and welfare of the people of the State.

In re Willing, 12 Cal. (2d) 591, 594, 86 Pac. (2d) 663;

Ray v. Parker, 15 Cal. (2d) 275, 101 Pac. (2d) 665.

The purpose of the statute is to eliminate economic disturbances and unfair practices and insure to producers the necessary costs of production so that an adequate supply of pure and healthful milk may be assured. Such economic security is necessary to maintain compliance with essential sanitary requirements.

In re Willing, supra, p. 594.

The statute is not primarily aimed at what the consumer shall pay, but what must be received in order to maintain an adequate supply of pure and wholesome milk.

United Milk Producers v. Cecil, 47 Cal. App. (2d) 758, 768, 118 Pac. (2d) 830.

3. Subdivision (6) of section 736.3(a) of the California Agricultural Code, added by amendment in 1941, is a valid exercise of this police power. The regulation bears directly upon the evil sought to be remedied and focalizes upon the acts of the licensed distributor within the jurisdiction of the state.

The incidence of the statute is upon the distributor and not upon the Federal Government. The legislation is not aimed at the Federal Government but is designed to meet a local situation which if left unregulated presents a menace to the milk supply of the State and to the health of its inhabitants. The statute in question is not unreasonable, arbitrary, or capricious, and the means adopted bear a real and substantial relation to the object sought to be attained. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.

Nebbia v. New York, 291 U. S. 502, 54 S. C. 505, 78 L. Ed. 940;

Osborn v. Ozlin, 310 U. S. 53, 60 S. C. 758, 84 L. Ed. 1074;

Alaska Packers Assn. v. Ind. Acc. Comm., 294 U. S. 532, 55 S. C. 518, 79 L. Ed. 1044.

The statute is not rendered invalid merely because the practical effect thereof might be to interfere to some

extent with the functioning of an instrumentality of the Federal Government, so long as such interference or burden is reasonable. The alleged interference here is reasonable. The statute does not discriminate against the government, but is applicable to the State itself and to its political subdivisions. If the objectives of the statute are realized the government will benefit in common with the community in general.

Milk Control Board v. Gosselin's Dairy, 301 Mass. 174, 16 N. E. (2d) 641;

Paterson Milk & Cream Co. v. Milk Control Board, 118 N. J. Law. 383, 192 Atl. 838;

James v. Dravo Contracting Co., 302 U. S. 134, 58 S. C. 208, 82 L. Ed. 155, 114 A. L. R. 318.

4. The only specific burden claimed to be cast upon the government is that of increased cost. Under the authorities this does not constitute an unconstitutional burden or interference. Such increased cost "at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." It is merely incidental to the proper exercise of the police power.

James v. Dravo Contracting Co., supra, U. S. p. 160, S. Ct. p. 221.

Alabama v. King and Boozer, 314 U. S. 1, 62 S. C. 43, 86 L. Ed. 1;

James Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 S. C. 431, 84 L. Ed. 596.

5. The state statute does not run counter to the Federal statutes requiring competitive bidding since it fixes minimum prices only.

6. The State statute does not run counter to the commerce clause of the Federal Constitution.

The interstate commerce question was not raised by the pleadings, and the language of the State Court holding that commerce between a State and a federal area within that State constitutes interstate commerce may well be regarded as *dictum*. To hold at this late date that commerce between a State and such federal areas within that State is interstate commerce, after nearly a century and a half during which the States and the Federal Government have treated that commerce as *intra*state commerce, would only result in utter, hopeless confusion. Such commerce has never been regarded as being interstate commerce. The courts that have directly considered that question have all held to the contrary.

Grayburg Oil Co. v. State, ... Tex. ....; 286 S. W. 489;

Grayburg Oil Co. v. State, ... Tex. ...., 3 S. W. (2d) 427;

People v. Standard Oil Co., 218 Cal. 123, 22 Pac. (2d) 2.

Even if it be assumed that such commerce is interstate and that under the Agricultural Marketing Agreement Act of 1937 the Secretary of Agriculture has the power to regulate the distribution of milk moving into such federal areas, the fact remains that he has not exercised such power. Under such conditions the State is not deprived of its power unless and until Congress has actually acted in a manner hostile to or directly in conflict with the State regulation.

Kelly v. Washington, 302 U. S. 1, 10, 58 S. C. 87, 92, 82 L. Ed. 3, 10-11;

Allen-Bradley Local 1111 v. Wisconsin Emp. Rel. Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 802.

I.

The Judgment Sought to Be Reviewed Is Final Within Section 237 of the Judicial Code.

The court, in postponing jurisdiction in this matter, requested counsel to discuss whether the judgment sought to be reviewed is final within section 237[7] of the Judicial Code.

The State Constitution provides that the Supreme Court shall "have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." (California Constitution, Art. VI, Sec. 4.)

That section has been held to give the court original jurisdiction in mandamus proceedings.[8]

> "Unless otherwise specially ordered, or a rehearing be granted, judgments of the Supreme Court in bank become final at the end of the thirtieth day after the date of pronouncement . . ."[9]

This proceeding was commenced in the State Supreme Court with the filing of a petition for a writ of mandamus.

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[7]Section 237 of the Judicial Code, in so far as we are here concerned therewith, provides as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had . . . where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

[8]*Hyatt v. Allen*, 54 Cal. 353;
Santa Cruz etc. Stock Co. v. Board of Supervisors, 62 Cal. 40;
Scott v. Boyle, 164 Cal. 321;
Dufton v. Daniels, 190 Cal. 577, 213 Pac. 949.

[9]Rule XXX, Rules for Supreme Court. Printed in 18 Cal. 2d 1, at page 23. See, also, Constitution, Article VI, Section 2.

The Court, in the exercise of its original jurisdiction, issued an alternative writ. The judgment of the court denying the peremptory writ was pronounced on March 12, 1942, and became final on April 11, 1942.

Under the decisions of the State Supreme Court a mandamus proceeding is an independent proceeding having for its purpose the compulsion of an act which the law specifically enjoins as a duty resulting from an office, trust or station.[10]

In this original proceeding the State Supreme Court determined finally that the petitioner was not entitled to the writ of mandate which it sought. Under the decisions of this court that judgment constitutes a final judgment within the meaning of section 237 of the Judicial Code.

The rule is stated to be that "all judgments and decrees which determine the particular cause are final in the sense of the statute * * * and it is settled that a proceeding in a mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute."[11]

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[10] *Sheehan v. Board of Police Commissioners*, 188 Cal. 525, 206 P. 70;
Boggs v. Jordan, 204 Cal. 207, 267 P. 696.

[11] *Detroit etc. Ry. Co. v. Michigan R. R. Comm.*, 240 U. S. 564, 571, 36 S. Ct. 424, 60 L. Ed. 802;
Weston v. Charleston, 2 Pet. 449, 463-465;
Central Transportation Co. v. Pullman Co., 139 U. S. 24, 40, 11 S. Ct. 478, 35 L. ed. 55;
Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U. S. 30, 36 S. Ct. 234, 60 L. ed. 507;
Davies v. Corbin, 112 U. S. 36, 40, 5 S. Ct. 4, 28 L. ed. 627;
McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869;
American Express Co. v. Michigan, 177 U. S. 404, 406, 20 S. Ct. 695, 44 L. ed. 823.
See, also:
Hartman v. Greenlaw, 102 U. S. 672, 26 L. ed. 271, and
Carroll v. Becker, 285 U. S. 380, 52 S. Ct. 402, 76 L. ed. 807.

The same rule obtains in proceedings in prohibition[12] and *habeas corpus*.[13]

Presumably the query of this Court as to jurisdiction was prompted by the fact that no final action had been taken revoking or suspending the license of appellant and that the proceedings for that determination are still pending before the State Director of Agriculture.

The instant proceeding for a writ of mandate is a distinct suit in court to test the jurisdiction of the Director of Agriculture to continue, with the proceeding pending before him.

The judgment of the State Court denying the writ finally disposed of that question of jurisdiction.

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[12] *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U. S. 30, 36 S. Ct. 234, 60 L. ed. 507;
Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 266 U. S. 200, 206, 45 S. Ct. 47, 69 L. ed. 247, 42 A. L. R. 1232;
Michigan Central R. Co. v. Mix, 278 U. S. 492, 494, 49 S. Ct. 207, 73 L. ed. 470;
Bandini Petroleum Co. v. Superior Court, Los Angeles County, Cal., 284 U. S. 8, 14, 52 S. Ct. 103, 76 L. Ed. 136, 78 A. L. R. 826;
Denver & Rio Grande W. R. Co. v. Terte, 284 U. S. 284, 285, 52 S. Ct. 152, 76 L. ed. 295.

[13] *Holmes v. Jennison*, 14 Pet. 540, 563, 614, 10 L. ed. 579, 618 append.;
People v. State of New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 70, 49 S. Ct. 61, 73 L. ed. 184, 62 A. L. R. 785, and cases cited.

In the *Bandini* case,[14] upon an appeal from a judgment denying a writ of prohibition sought to prevent the enforcement of a preliminary injunction, this Court said (p. 14 U. S., p. 105 S. Ct.):

> "This Court has jurisdiction. The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the meaning of section 237(a) of the Judicial Code. (Citing cases.) That judgment, however, merely dealt with the jurisdiction of the Superior Court of the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based."

In the *Grays Harbor*[15] and *Wick*[16] cases, suggested by this Court for comparison with the *Bandini* case, *supra*, the judgments of the state courts under review here were appeals from the Superior to the Supreme Court of the State in condemnation proceedings.

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[14] *Bandini Petrolcum Co. v. Superior Court*, 284 U. S. 8, 52 S. Ct. 103, 76 L. ed. 136, 78 A. L. R. 826.

[15] *Grays Harbor Logging Co. v. Coats Fordney Logging Co.*, 243 251, 37 S. Ct. 295, 61 L. ed. 702.

[16] *Wick v. Superior Court*, 278 U. S. 575, 49 S. Ct. 94, 73 L. ed. 514 (memo. dec.).

After hearing testimony upon the question of necessity, the Superior Court entered an order of condemnation and set the cause for trial to determine and assess the damages. At this point application for certiorari to the State Supreme Court was made to review the constitutionality of the order of condemnation. The latter court upheld the same and remitted the cause to the Superior Court for further proceedings.

This Court expressed some doubt as to whether this judgment of the State Supreme Court was final or not for the purposes of section 237 of the Judicial Court. It concluded, however, that it was not final because the State Supreme Court had not interpreted such judgments in any other sense than as interlocutory and had nowhere described them as "final" or as "independent" judgments.

Under these circumstances it seems clear that the judgment in the instant case is governed by the *Bandini* case, and not by the *Grays Harbor* and *Wick* cases; and is a final judgment within the meaning of section 237 of the Judicial Code.

II.

Constitutionality of California Milk Control Law.

That the state and federal governments may completely regulate the milk industry including the fixing of prices is no longer open to serious question.[17]

The constitutionality, aside from federal questions, of the California Milk Control Law has been thoroughly established by the courts of that State. (*Jersey Maid Milk Products Co. v. Brock, supra; Ray v. Parker, supra; In re Willing,* 12 Cal. (2d) 591, 86 Pac. (2d) 663.)

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[17] *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940;
Highland Farms Dairy v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. ed. 835;
Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 55 S. Ct. 7, 79 L. ed. 259;
U. S. v. Rock Royal Co-op., 307 U. S. 533, 83 L. ed. 1440, 59 S. Ct. 993;
U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 86 L. ed. 431, 62 S. Ct. 523;
Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669;
Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. ed. 752;
(Alabama) *Franklin v. State,* 232 Ala. 637, 169 So. 295;
(Florida) *Miami etc. v. Milk Control Board,* 124 Fla. 797, 169 So. 541;
(Georgia) *Bohannon v. Duncan,* 185 Ga. 840, 196 S. E. 897;
(Indiana) *Albert v. Milk Control Board,* 210 Ind. 283, 200 N. E. 688;
(Massachusetts) *Milk Control Board v. Gosselin's Dairy,* 301 Mass. 174, 16 N. E. (2d) 641;
(Michigan) *Johnson v. Mich. Milk Marketing Board,* 295 Mich. 644, 295 N. W. 346;
(New Jersey) *State v. Newark Milk Co.,* 118 N. J. Eq. 504, 179 Atl. 116;
(Oregon) *Savage v. Martin,* 161 Ore. 660, 91 Pac. (2d) 273;
(Pennsylvania) *Rohrer v. Milk Control Board,* 322 Pa. 257, 186 Atl. 336;
(Virginia) *Reynolds v. Milk Commission,* 163 Va. 957, 179 S. E. 507;
(Vermont) *State v. Auclair,* 110 Vt. 147, 4 Atl. (2d) 107;
(Wisconsin) *State v. Lincoln Dairy,* 221 Wis. 1, 265 N. W. 197.

III.

Subdivision (6) of Section 736.3(a) Is a Valid Exercise of the Police Power of the State.

As has already been shown, there can be no doubt as to the power of the State to regulate the purchasing, processing, bottling, delivering and handling of fluid milk within its own jurisdiction. And appellant does not generally attack the validity of this provision.

It is not contended that the State may not prohibit such purchasing, processing, etc. of fluid milk which is to be or is sold within the outer boundaries of a milk marketing area at less than the minimum prices prescribed for such area, whether the place of sale be a part of the marketing area or not, provided such place be within the jurisdiction of the State.

The question presented by this appeal is whether subdivision (6) may validly apply when such sale takes place to an agency of the Federal Government and upon a federal enclave (Moffett Field) located within the external boundaries of the State milk marketing area.

Appellees do not contend that Moffett Field is politically or jurisdictionally either within the State or within the Santa Clara County marketing area. It is, however, within the "outer, outside and external boundaries or limits" of both. There is no contention that California has any jurisdiction whatever over Moffett Field except to serve civil or criminal process therein.

The State of California has consistently maintained that it has no authority, and the California Director of Agriculture has persistently refused, to fix minimum

prices for milk sold within federal enclaves within its borders, such as Moffett Field and the San Francisco Presidio.[18]

This action was commenced prior to any declaration of war on the part of the United States and no conflict between state regulation and federal war time powers is involved.

We do contend that the purchasing, processing, bottling, transporting, delivering or other handling of fluid milk in the Santa Clara County Marketing Area under contract or arrangement for the sale or disposition thereof at prices less than the minimum wholesale or minimum retail prices effective in such marketing area constitutes an unfair trade practice which the State of California may effectively reach in the exercise of its police power. And we contend that this is true, notwithstanding the fact that subsequent to such purchasing, processing, etc., within the Santa Clara County Marketing Area the ultimate sale or disposition of such fluid milk occurs, or is to occur, at Moffett Field, a place within the geographical limits of the marketing area, but not politically or jurisdictionally within the area.

It may be that the effect of the exercise of such a power by the State of California will be to make it impracticable for the Federal Government to obtain at Moffett Field fluid milk at prices less than those established for the Santa Clara County Marketing Area surrounding the field, but that is purely incidental.

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[18]See opinions of California Atty. Gen., N.S. 1905 and N.S. 1950 [1939] and *Consolidated Milk Producers v. Parker*, 19 Cal. (2d) 815, 123 Pac. (2d) 440, decided by the State Supreme Court the same day as the instant case.

Of course we do not contend that the State of California would have power to regulate or control the acts or prices of milk distributors whose purchasing, processing, bottling, transporting, delivering or handling of the milk might occur wholly within the limits of Moffett Field.

For example, the Post Exchange, situated within the Presidio of San Francisco and operating wholly on territory subject to the exclusive jurisdiction of the United States, sells milk at retail to consumers largely composed of military personnel. The State does not attempt to regulate the prices of milk so sold to consumers on the reservation, nor do we contend that it would have power so to do. (*Standard Oil v. California*, 291 U. S. 242.)

However, to admit that the State has no power to regulate prices where the transaction is one wholly within Federal territory is not to admit that the State may not control acts within its own jurisdiction by prohibiting its licensed milk distributors from handling milk within the State unless an established minimum price is received for such milk, when the State has determined that the receipt of such minimum price is necessary to insure an adequate supply of pure and wholesome milk; even though the sale thereof be made within Federal territory.

The State Supreme Court recognized this differentiation in holding on the same day it decided the instant case, that the State was without authority to establish milk prices on Federal territory within the geographical boundaries of the State. (*Consolidated Milk Producers v. Parker*, 19 Cal. (2d) 815, 123 Pac. (2d) 440.)

A. Immunity of Federal Government.

It is conceded as a general legal proposition that the national government is immune from state regulation that constitutes a direct burden upon the Federal Government or interferes with the performance of its functions.

But this does not *ipso facto* immediately withdraw from the authority of State regulation every person dealing with the Federal Government or performing a part of the State regulated transaction upon federal territory.

The cases most generally advanced in support of what is often claimed to be complete immunity stem from *McCulloch v. Maryland*, 4 Wheat. 316.[19]

Chief Justice Marshall in the *McCulloch* case (p. 326) laid down the principle that the power to tax is the power to destroy.[20] He said: "A question of constitutional power can hardly be made to depend on a question of more or less."

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[19] *e. g.: Osborn v. U. S. Bank*, 9 Wheat. 738;
Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699;
Johnson v. Maryland, 254 U. S. 51, 41 S. Ct. 16, 65 L. ed. 126;
Hunt v. U. S., 278 U. S. 96, 49 S. Ct. 38, 73 L. ed. 200.

[20] Mr. Justice Frankfurter, in a concurring opinion in *Graves v. New York ex rel. O Keefe*, 306 U. S. 466, 489, 59 S. Ct. 595, 602-3, characterized this as a "seductive cliché," and said that "the web of unreality spun from" it "was brushed away by one stroke of Mr. Justice Holmes' pen" in the *Panhandle Oil* case, "'The power to tax is not the power to destroy while this Court sits.'"

Under this any State law which imposed a demonstrable burden upon the Federal Government was held to be invalid.[21]

It was this construction which for years resulted in the non-payment of state personal income taxes by federal employees and *vice versa*.[22]

In the *Osborn* case, *supra*, Chief Justice Marshall followed his opinion in the *McCulloch* case, *supra*, and held that a state could not tax a federal bank. It was in the course of the opinion that he said (p. 865): "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."

It may well be that a contractor can not be restrained from purchasing military supplies within a state nor from transporting such supplies through such state to a military post. But it can hardly be said at this day that he marches through the State like Sherman's army through Georgia wholly freed from State regulation. In the making of

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[21]See Mr. Justice Roberts' dissenting statement in *James v. Dravo Contracting Co.*, 302 U. S. 134, 181, 58 S. Ct. 208, 230-1: "From that day to this the Court has consistently held that the question is not one of *quantum*, not one of the weight of the burden, but one of power. * * * Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."

[22]*Cf. Collector v. Day*, 11 Wall. 113, 20 L. ed. 122, with *Helvering v. Gerhardt*, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427, and *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A. L. R. 1466.

purchases he is subject to a state sales tax,[23] and in the transportation he undoubtedly must comply with State highway and traffic regulations.[24]

We know of no instance in which it has been held, or even seriously contended, that a contractor did not have to pay, or that a common carrier did not have to charge, the rates prescribed by the State railroad or public utility commission for such transportation within the State because the goods transported were for use by the Government on Federal territory within the State.

In *Ohio v. Thomas, supra* (1899), the governor of the soldiers' home was convicted of violation of the State law requiring a placard to be displayed in eating houses using oleomargarine, stating that fact. The conviction was reversed upon the ground that "the act complained of was performed as part of the duty of the governor as a Federal officer in and by virtue of valid Federal authority, * * *". (U. S., p. 284.)

Unquestionably the decision would have been to the contrary had defendant been an ordinary caterer furnishing meals to the inmates of the home under an independent contract. Certainly today the Federal Government looks to local regulation for the protection of its officers and soldiers in the meals furnished them in restaurants and hotels. Who will say that such a hotel or restaurant operator could successfully defend his violation of a local regulation upon the sole ground that such violation was committed only in the furnishing of food to a Federal officer or soldier?

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[23] *Cf. Alabama v. King & Boozer*, 314 U. S. 1, 62 S. Ct. 43;

[24] *Cf. South Carolina v. Barnwell*, 303 U. S. 177, 58 S. Ct. 510.

Johnson v. Maryland, supra (1920), held that an employee of the U. S. Post Office Department was not required to obtain a state motor license before transporting mail in a Government motor truck. Here, again, the decision turned upon the fact that the State requirement interfered directly with a Federal employee in the performance of his official duties.[25] Mr. Justice Holmes, who delivered the opinion, called attention to the fact that even "an employee of the United States does not secure a general immunity from State law while acting in the course of his employment."

In the instant case, however, no Federal official or employee is involved. The State regulation falls solely upon a citizen of that State in the conduct of an operation which at his request he has been licensed by the State to perform under certain conditions.

Whatever immunity from State regulation attaches to a Federal official or employee is not, however, generally applicable to private parties furnishing supplies or rendering services to the Federal Government in an independent capacity.

The present Chief Justice clearly marked this distinction in speaking of a party claiming such immunity,

> "who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes *not unlike a contract to sell and deliver a commodity*. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself can-

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[25] *Cf. Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273, 75 L. ed. 496, where the Court sustained a state tax upon gross receipts of an *independent contractor* carrying United States mail.

not be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way."[26] (Italics supplied.)

It seems clear that the complexities of modern life and the increased interrelationship of Federal and State agencies due to the growth of governmental regulation has brought about a decline in the extent of Federal immunity.

Mr. Justice Holmes, who wrote the opinion in *Johnson v. Maryland, supra*, later (1928), reflected this in a dissenting opinion in the *Panhandle Oil* case,[27] joined in by the present Chief Justice and by Mr. Justice Brandeis.

It is an assumption, warranted by the practically unanimous[28] refusal of this Court to follow the majority opinion

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[26] *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524-5, 46 S. Ct. 172, 175, 70 L. ed. 384.

[27] *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 224-5, 48 S. Ct. 451, 453-4, 72 L. ed. 857:

"To come down more closely to the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else.

"* * * I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the Veterans Hospital, because they are instrumentalities of Government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree. * * *"

[28] Mr. Justice Jackson did not participate.

in the *Panhandle Oil* case,[29] that the dissenting views expressed therein by Mr. Justice Holmes are now the views of the present Court.

Mr. Chief Justice Hughes in delivering the majority opinion in the *Dravo* case[30] sustaining the validity of a State tax upon the gross income of a contractor including his receipts from contracts performed for the Government stated that:

> "As 'neither government may destroy the other or curtail in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other; * * *'"[31]

It seems clear at the present time that Federal immunity is not complete and absolute. That "the question is not one of *quantum*, not one of the weight of the burden,

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[29] *Alabama v. King & Boozer*, 314 U. S. 1, 9, 59 S. Ct. 43, 45;

[30] *James v. Dravo Contracting Co.*, 302 U. S. 134, 156-7, 58 S. Ct. 208, 219, 82 L. ed. 155.

[31] It was after this decision that Mr. Justice Jackson, then the Attorney General of the United States, writing of Mr. Chief Justice Hughes in the American Bar Journal for July, 1941, Vol. 27, p. 410, said:

> "Apart from the field of taxation, however, the Chief Justice has gone very far in sustaining State regulatory statutes, particularly those which have been assailed as being in conflict with federal power. He has always appeared careful to concede the broad sweep of federal authority which could supersede the State statute if Congress should so desire; but even where Congress has legislated in the field, he has generally upheld the State statute if it was not in conflict with the federal legislation. State regulatory statutes generally have received hospitable consideration at his hands."

but one of power,"[32] as expresesd in the dissenting opinion in the *Dravo* case, is no longer correct; but instead, as stated by Mr. Justice Holmes in the *Panhandle Oil* case dissent, "the question * * * is one of reasonableness and degree * * *."[33]

The Federal Government may not be directly taxed nor regulated. But parties dealing with Federal Government or on its territory may be taxed or regulated, provided that such Government is not thereby unduly burdened or unreasonably interfered with.

For a determination of this question we must look to the purpose of the State statute and to its effect upon the Federal Government.

B. Purpose of State Statute.

The general trials and tribulations of the milk industry and the necessity for a governmental regulation of prices are clearly and vigorously set forth by Mr. Justice Roberts in the *Nebbia* case, *supra.*

The particular difficulties existent in California and the purpose and objectives of the Statute in that State are vividly portrayed in the language of Mr. Justice Traynor in the opinion of the State Supreme Court in the present case. [R. 16-18, 21.]

The preamble[34] to the statute declares:

> "that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now

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[32] *James v. Dravo Contracting Co., supra,* U. S. p. 181, S. Ct. p. 230.

[33] *Panhandle Oil Co. v. Mississippi, supra,* U. S. p. 225, S. Ct. p. 454.

[34] Appendix "A," p. 5.

being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threatens to destroy and seriously impair the future supply of fluid milk; * * *"

In its original form in 1935 the California Milk Control Law prescribed minimum prices to the producers only. To insure a sufficient return to the producer to enable him to stay in business and comply with the sanitary requirements, thus assuring the inhabitants of the State an adequate supply of pure and wholesome fluid milk is admittedly the prime objective of this legislation.

It has been urged at times, and was thought when this law was first enacted, that the bonding provisions[33] were sufficient to guarantee the payment of the prescribed minimum prices to producers. The bonds, however, proved to be wholly insufficient in amount to cover the losses to producers due to non-payment by distributors. A sufficient number of the latter continued their cut-throat competition with cut prices, rebates, discounts, gifts, etc. This naturally always resulted in the failure of a certain number of such distributors. Due to the practice in the milk industry of paying producers for milk furnished late in the succeeding month or even in the second succeeding month after it is

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[33]Appendix "A," Sec. 737.5(b), pp. 24-5.

delivered, the losses resulting from these failures were passed on and inevitably fell upon the producers.

Fluid milk is a perishable product which the producers must dispose of daily as it is produced. New outlets are difficult to obtain especially on short notice. The result is that producers are completely at the mercy of distributors 90% of the time. On the other hand the price of the raw product due the producer constitutes approximately 60% of the resale price of the finished product. Consequently a distributor can cut the ordinary or prescribed resale price 50%, collect from the purchasers and continue doing business just as long as he can avoid paying his producers or keep them in line by payments of fractional amounts on account.

Fortunately, or unfortunately, depending upon the viewpoint, the producer has a ready market for his dairy herd at the slaughter house for beef and when he has reached his limit he sends his cows to the slaughter house and the available supply of fluid milk is reduced just that much for the years that it takes to develop a new dairy herd.[38]

Upon investigation it was found to be impracticable to require an increase in the amount of the distributors' bonds sufficient to take care of this situation. Bonds in such an increased amount would be procurable by only a few large state-wide and national distributors because of the premium rates and collateral required. All the other smaller distributors would be eliminated.

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[38]This very practice is now an acute national problem due to the O.P.A. ceilings placed on wholesale and retail fluid milk prices without any corresponding ceiling on increasing labor and feed prices which make up the bulk of the cost to the producer of fluid milk.

In the light of these considerations Article 2A[37] was added in 1937 to provide for minimum wholesale and retail prices. This served to remedy the situation in so far as the milk distributed within a milk marketing area was concerned.

But it developed that considerable danger still existed because some distributors sold their milk beyond the jurisdiction of the marketing area and persisted in the old cut-throat practices. This led other distributors to dispose of their surplus in the same manner. The Presidio at San Francisco had long been a thorn in the side of the San Francisco Marketing Area. Producers constantly urged the Director of Agriculture to establish minimum prices in the Presidio but the State maintained that it had no authority to fix prices within this Federal territory. This finally resulted in the mandamus proceeding to compel the State to establish such prices and the denial of such a writ by the State Supreme Court.[38]

With the establishment of many military camps in California and the large increase in the amount of milk used therein this situation was greatly aggravated and the problem became acute, and the State Legislature was forced to grapple with it.

Subdivisions (6), (7), and (8) of section 736.3(a) were first offered in the California Legislature March 27, 1941. Subdivision (6) first appeared in its present final form on May 8, 1941. The bill containing these three subdivisions was finally passed June 14, 1941, was ap-

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[37]Appendix "A," pp. 19-24.

[38]*Consolidated Milk Producers v. Parker*, 19 Cal. (2d) 815.

proved by the Governor June 16, 1941, and became effective September 13, 1941.[39]

During this period, in an effort to achieve a perfect solution of this problem in co-operation with the Federal Government, a joint resolution was offered in the State Senate April 7, 1941, memorializing Congress to enact legislation making the California minimum milk prices the minimum prices for the Federal enclaves within the respective milk market areas within the State. This joint resolution was adopted by the State Legislature April 28, 1941.[40]

This resolution recites the policy and objective of the State system of minimum milk prices payable to producers, distributors and to retailers of milk; the necessity and urgency fof such system of milk price control; the increasing extent of the practice of selling milk by California distributors to the Federal Government at places ceded to or owned by the United States at less than minimum wholesale and retail prices established for California milk marketing areas; the disastrous effects of such practice upon the State's statutory scheme for stabilization of the basic milk business, and the urgency for correcting the situation.

We have attached this resolution to this brief as Appendix "B."

There can be no doubt, therefore, concerning the legislative determination of the public necessity for reaching a situation affecting California milk producers, distributors, retailers and consumers.

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[39]Stats. 1941, Chap. 1214, p. 3008.
[40]Stats. 1941, Chap. 65, p. 3402.

By the addition of these three subdivisions, California sought to safeguard its milk supply for the benefit of the inhabitants within its boundaries, whether they were subject to its jurisdiction or not, by insuring the payment to producers of an amount adequate to permit them to maintain production.

Subdivision (6) seeks to protect the *producer* price by prohibiting the distributor from purchasing, processing, etc., the milk within the marketing area unless he receives the established resale price for that area which the State has found to be necessary to enable him to pay the producer price and recover his essential costs of distribution. This applies throughout the geographical limits of the marketing area whether the distributor sells the milk within a Federal enclave or not. It will be noted that the Government or any parties within the Federal enclave may obtain milk from any other source without any so-called interference or repercussions from this subdivision. And stores or other agencies within the enclave may sell at any prices whatsoever. The State is concerned *only* with seeing that a distributor whom it licenses to do business within its jurisdiction does not use that license to obtain its milk and dispose of the same at such a loss that the distributor cannot pay the producer his minimum price.

Subdivision (7) simply requires a distributor to pay the minimum price to the producer regardless of whether he sells the milk to the Federal, State or local government. It may be argued by appellant that this subdivision amply protects the producer price. But this alone is just as inadequate as the original 1935 law was found to be until the distributors' resale prices were added in

1937. It only "locked the barn door after the horse had been stolen" and would be simply another instance of "too little—too late."

Subdivision (8) provided the necessary protection for milk moved from one marketing area to another or into portions of the State where no marketing areas had yet been designated.

Thus, subdivision (6) is but giving effect to the basic objective of the statute—to safeguard the milk supply produced within the State by insuring to the producer the essential cost of his production. The State is not concerned with establishing milk prices within Federal territory and has refused to attempt to do so. Its concern is that the distributor obtain a sufficient price to insure payment to the producer.

Such a law is not peculiar to California, alone. Many states have enacted similar laws. Our Federal Government, itself, has recognized the absolute necessity of such production and has sought to achieve the same basic objective in the Federal Agricultural Adjustment Act, as amended.[41] Under this it has established several milk marketing areas where the milk was brought in through interstate commerce. Both the Federal act[42] and the State law[43] authorize and provide for co-operation between the Federal and State governments in achieving the common basic objective of these two enactments.

Furthermore, in the instant case, the Federal Government is just as dependent upon the California milk supply

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[41] 7 U. S. C. A. 608c(5).

[42] Appendix "C," p. 99. (bid 114)

[43] Appendix "D," p. 100. "A" p 73 Sec. 735.8

to provide milk for Moffett Field and all its other enclaves within that State as is the State, itself. And it is, or should be, just as concerned as California in insuring such an adequate supply of pure and wholesome milk.

It should not seek to repudiate in its own practice the very principle which it not only preaches but enforces in commerce between the states.

Practically (although not necessarily) subdivision (6) will result in imposing to a considerable extent the State minimum wholesale milk prices upon the Federal enclaves situated within the geographical limits of the several milk marketing areas within the State.

The question then, to use the language of this Court in *Osborn v. Ozlin*, 310 U. S. 53, 62, is whether California "has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere."

Is there any "constitutional restriction" against the policy here adopted? Has the Constitution "placed control elsewhere"? These are the questions which must be answered here. As stated by Chief Justice Shaw in *Norris v. Boston*, 4 Metc. (Mass.) 282, 292-3 (1842):

> "In considering, therefore, whether it is competent for a state to pass any particular law, we look rather to the ends to be attained, than to the particular enactments by which they are reached."

There is no contention here that the object sought to be attained is not legitimate nor that the means selected do not have a real and substantial relation to that object nor that the statute is unreasonable, arbitrary, capricious,

or discriminatory. This, the Court has repeatedly held, is all that the guarantee of due process demands.

We are concerned, therefore, only with the inquiry whether the act of a distributor in purchasing, processing, etc., milk within the jurisdiction of the State and within the jurisdiction of a milk marketing area thereof, under contract or arrangement or purpose to sell for prices less than the established prices in the area, constitutes in and of itself an act fairly related to the attainment of the objectives or enforcement of the Milk Control Law.

That it does constitute such an act is clear when we consider that the incidence of the statute is upon the distributor, and not upon the Federal Government or other ultimate vendee of the milk, and that the mischief with which the State is concerned is, not the payment by the Federal Government or other ultimate vendee of less than established prices, but rather the distribution by the distributor, that is, his purchasing, processing, etc., of fluid milk within the area under arrangements resulting in the receipt of prices which are insufficient to cover the necessary costs of production and distribution.

We have appended hereto the pertinent portions of the Schedule of Minimum Wholesale prices for the Santa Clara Marketing Area, issued by the Director of Agriculture effective October 24, 1941 [Appendix "C"] and also a "Report by the Bureau of Markets regarding the method used to determine the cost of distributing fluid milk to agencies of the Federal Government for the Santa Clara County Marketing Area" [Appendix "D"].

The schedule fixes the minimum wholesale price of milk of 4% or less milk fat content in half pint con-

tainers at 4¢. Agencies of the Federal, State and local governments are allowed discounts of up to 12½%, based on the volume of monthly sales.[44] In this particular case the monthly sales total on fluid milk was between $3,000 and $5,000 and the allowable discount under the schedule was 10%, making the price to the army 3.6 cents.

In arriving at the cost of distributing milk to agencies of the Government items such as cost of collectors, bad debt expense, selling expenses and advertising expense were eliminated. Notwithstanding the elimination of those items the total raw product cost for Government, sales, plus operating expenses for this type of distribution, was found to be 3.3812 cents[45] per half pint, excluding any return on the distributor's investment.

Appellant agreed to furnish half pints at 2.5 cents with a further discount of 5%, or 2.375 cents per half pint. It is at once apparent that according to the costs of distribution as determined by the Department of Agriculture, appellant, when it contracted to sell milk to the Government at 2.375 cents per half pint, was doing business at a substantial loss. This would be bound to result in eventual insolvency and consequent inability to pay to the producer or producers from whom it purchased the milk the prices fixed by the stabilization plan, thus defeating the entire purpose of the statute. The whole theory of the statute is that distributors and producers must receive at least the minimum prices fixed in order that they may avoid insolvency, remain in business and

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[44]Appendix "C," p. 107.

[45]Appendix "D," p. 110.

thus to assure an adequate supply of pure milk. To permit a distributor to do business at a loss brings about the very evil that the statute was designed to correct and destroys its very foundation.

It is obvious that the purchasing, processing, bottling, transporting or other handling of fluid milk by a distributor within a marketing area under arrangements for ultimate receipt beyond the area of less than his reasonable costs of distribution, as determined by the Director of Agriculture after investigation and public hearing, is just as mischievous and destructive as far as the purposes of the statute are concerned as similar acts of distribution for ultimate sale within the area at prices less than the distributor's reasonable costs of distribution.

In other words, the State is not concerned particularly with where the milk is ultimately sold or disposed of, or to whom the milk is ultimately sold. Its sole concern is that the distribution of the milk within the area, including all phases of distribution, shall be under arrangements for the receipt ultimately of prices wholesale or retail, sufficient to cover the reasonable costs of such distribution.

A distributor who purchases, transports, processes or bottles milk within the area under such arrangements for the sale thereof at less than the minimum prices fixed by law for the area within which such distribution occurs runs counter to the essential theory of the Milk Control Law.

That law is based upon the theory that producers must receive from distributors' prices sufficient to cover the costs of production and to keep them engaged in the

essential production of milk with some degree of solvency, and upon the further theory that, in order to accomplish this purpose with respect to producers, distributors must, in and about all of their acts of distribution, operate under price arrangements that will enable them to meet and pay such fair prices to producers. A distributor who, in the course of any of the phases of distribution, ranging from purchase of milk at the dairy and on through processing, bottling and transporting, operates under arrangements that tend to disable him from maintaining his ability in this regard, strikes at the roots of the milk stabilization system.

In view of these facts, how can it be justly said that the State of California cannot legislate to safeguard the milk stabilization system by reaching such distributor in the course of any of his acts of distribution, regardless of where or to whom the milk is to be or is sold.

The destination of the milk is an indifferent circumstance as far as the purpose of the State is concerned.

Nor is this a case where the right of the State to regulate the milk business is "used as a part of a scheme to accomplish a forbidden result."

Fidelity and Deposit Co. v. Tofoya, 270 U. S. 426. 434.

California's interest in the matter here sought to be regulated is clear. The maintenance and protection of the public health through the adequate and continuous supply of pure milk is a matter of vital and local public concern. And it is her only concern. California's purpose is not to regulate the Government nor to place a burden upon the Government nor to interfere in any

way with any function of the Government. If any of these things occur they are but incidental to a valid exercise of the police power. The legislation is not aimed at the Federal Government but rather is designed to meet a local situation which if left unregulated presents a menace to the entire milk supply of the State.

In *Nebbia v. New York*, 291 U. S. 502, 521, this Court stated that "save the conduct of railroads no business has been so thoroughly regimented and regulated by the State of New York as the milk industry."

The same is true of California. As early as 1872 San Francisco enacted an ordinance prohibiting the feeding of cows on still slops and the sale of milk from cows so fed and from sick or diseased cows.

Johnson v. Simonton, 43 Cal. 242.

Since that time the milk industry has been progressively subjected to an ever increasing measure of control until every conceivable phase of the industry has been regulated to a greater or less degree. An entire Division of the Agricultural Code consisting of innumerable sections is devoted to milk and milk products and nearly all of this legislation has for its purpose the protection of the public health. The regulation of the milk business is one which is, and has always been "traditionally local."

Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740, 749.

The subject is "peculiarly one of local concern" and from its nature belongs to the class with which the

State may appropriately deal in making reasonable provisions for local needs.

Simpson v. Shepard, 230 U. S. 352, 402.

It is clear that the legislation under attack is directly concerned with the protection of the public health and welfare, a matter clearly within its police power, and hence under no circumstances can be regarded as a scheme to accomplish a forbidden result.

C. A State May, in the Exercise of Its Police Power, Legislate in Respect to Acts Done Within Its Jurisdictional Limits, Regardless of Whether Such Acts May Be Part of a Transaction Originating or Culminating Beyond Its Jurisdictional Limits, Whenever the Acts Dealt With Are Such as to Reasonably Require Prohibition or Control in Order to Effect a Proper Police Policy of the State or the Enforcement Thereof.

In *Mirkovitch v. Milnor*, 34 Fed. Supp. 409, 411 (September, 1940), considered and decided by a three-judge Federal District Court, the plaintiff questioned the validity of a provision of the Fish and Game Code of California. Section 11.10 of that code provided in substance that no person shall use or operate in this State or its waters any boat, used in connection with fishing operations, irrespective of its home port or registry, which boat delivers to any point or place other than within this State any fish caught in such boat in the waters of the Pacific Ocean within this State or on the high sea or elsewhere, unless a permit authorizing the operation of such boat shall have been issued by the Fish and Game Commission.

There, as here, the acts affected by the statute occur within the State's jurisdiction, but the part of the transaction giving rise to the offense occurs beyond that jurisdiction.

The Court held that the statute was a valid exercise of the police power of the State over the operations of such boat within State waters and that the statute was not an illegal attempt by the State to extend its legislation beyond the boundaries of its jurisdiction.

The Court pointed out in its opinion that the law in question related solely to the operation within State waters of fishing vessels engaged in delivering their catch outside the State and regardless of where the fishing occured. The Court further pointed out that the object of the enactment was not to affect fishing operations beyond the State's jurisdiction, but rather to protect and conserve the State's fisheries from possible depletion and waste by virtue of uncontrolled taking of fish from waters of the State to points beyond its jurisdiction.

Further, the Court pointed out that, although the plaintiff might find himself unable to carry on his fishing operations beyond the State's jurisdiction without entering and operating his boat within State waters, the statute would not be for that reason void in making it necessary for him to apply for a permit so to do, if the provisions of the law requiring such permit were sustainable as a proper exercise by the State of its police power in the conservation of its fisheries. The Court said:

"* * * Section 1110 of the Fish and Game Code does not purport, by its terms, to forbid or

control fishing operations beyond the State's jurisdiction. * * *

"* * * The statute cannot be fairly construed, on its face, to be an illegal attempt by the state to extend its legislation beyond the boundaries of its jurisdiction, since it clearly appears therefrom that the acts prohibited without, and allowed with, a permit, are acts which are to be performed within the territorial jurisdiction of the state. * * *"

"* * * Unless all fishing boats within state waters which deliver their catch beyond the state's jurisdiction are brought within the operation of Section 1110 of the Fish and Game Code, it is apparent from the nature of things that there can be no effective control over those boats whose operations within state waters tend to impede the administration and enforcement of the state's fish and game laws and tend to the depletion and waste of its fish supply. * * *"

The same principle has been applied by the Supreme Court of the United States in *Bayside Fish Co. v. Gentry*, 297 U. S. 422, 426 (October, 1935), wherein the Court sustained the validity of a portion of the Fish and Game Code of California regulating the canning, curing, preserving or packing of fish taken from the waters of the State or brought into the State in a fresh condition. The Court said:

"* * * Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates

as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz v. Hesterberg,* 211 U. S. 31, 39-40."

The Court also stated that "If the enforcement of the act affects 'interstate or foreign commerce,' that result is purely incidental, indirect and beyond the purposes of the legislation."

In *Skiriotes v. Florida,* 313 U. S. 69, 61 S. Ct. 924, 85 L. ed. 1183 (April, 1941), a Florida citizen was prosecuted under a State statute making it unlawful to use diving apparatus in taking commercial sponges from waters within the territorial limits of the State, defined as nine nautical miles from the shoreline. It was contended that this definition of the territorial limits of the State was invalid, had never been approved by Congress and that the extent of the territorial limits of the State was three miles from the shoreline and that, therefore, the State had transcended its power because the statute attempted to reach operations of the defendant inimical to the interests of the State but outside the territorial waters of the State.

Chief Justice Hughes, upholding the defendant's conviction under the statute, said:

"* * * Even if it were assumed that the locus of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the prescribed divers' equipment at that place. No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved.

> No right of a citizen of any other State is here asserted. The question is solely between appellant and his own State."

It will be observed that the Court, in the above case, went a great deal further than is necessary in the case at bar. It held that, even if the locus of the offense denounced by the statute was on the high seas beyond the limits of the State, the State could govern the conduct of its own citizens at such place with respect to matters in which the State had a legitimate interest and where there was no conflict with acts of Congress.

In the case at bar, however, the locus of the offense, to wit, the unfair trade practice with which petitioner has been charged in the departmental complaint, is not within a place beyond the jurisdictional limits of California, but wholly and entirely within the jurisdictional limits of the State of California and its milk marketing area.

In *Alaska Packers Association v. Industrial Accident Commission, etc.*, 294 U. S. 532, this Court held the California Workmen's Compensation Act applicable to an injury sustained in Alaska by a workman who had entered into a contract of employment in California to work for the packer in Alaska during the salmon canning season. The court pointed out the seasonal nature of the occupation and to the fact that without a remedy in California the workmen would be remediless and there was a danger that they would become public charges. These matters the Court stated were of grave public concern to the State. The Court held that:

> "the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status that gives rise to those con-

> sequences * * *. Objections which are founded upon the Fourteenth Amendment must, therefore, be directed, not to the existence of the power to impose liability for an injury outside state borders, but the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process."

Here the State had control of the status of appellant as a licensed distributor of milk and it was that status which gave rise to the consequences complained of. Appellant's objection that it is being deprived of due process by reason of the alleged attempt to exercise power over a subject matter not within its constitutional jurisdiction must therefore be directed, not to the existence of the power, but rather to the question as to whether its exercise is so arbitrary and unreasonable as to amount to a denial of due process.

However, appellant nowhere complains that the State's action is arbitrary or unreasonable. As already pointed out the statute is directed at a situation of local and public concern, and as shown elsewhere herein, the state itself and its political subdivisions are required to pay the prices for milk fixed by the director.

> "The guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained."
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> *Nebbia v. New York*, 291 U. S. 502, 525.

The California statute here involved meets that test.

In *Osborn v. Ozlin*, 310 U. S. 53, 62 (Oct., 1939), this Court upheld the validity of a Virginia statute requiring

that insurance of casualty and surety risks in Virginia shall be through legally constituted and resident agencies of the companies and that such resident agent should receive the usual and customary commission on such contracts and should not share more than one-half of a commission with a non-resident broker.

Answering the contention that the State had no power to regulate or penalize the making, beyond its borders, of contracts of insurance upon persons or property located within the State by forcing a commission to be paid to a resident agent, the Court said:

> "But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. * * * Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere * * *
>
> "Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it."

The Court proceeded to hold that the requirement of the statute for the placing of such insurance through an agency resident in Virginia bore a reasonable relationship to the regulation by the State of the integrity of the conduct of the business of insurance within the State of Virginia.

In the case at bar distributors purchasing, processing, etc., milk within the jurisdictional limits of California, under arrangements insufficient to meet the distributors' reasonable costs as reflected in the minimum prices established by the Director of Agriculture for the area are performing acts within the State so closely related to the legitimate interests of the State as to permit, indeed to require, the attention and control of the State, regardless of the ultimate destination of the milk.

In cases dealing with the applicability of minimum milk price regulations to distributors engaged in selling milk to various instrumentalities of the Federal Government, it has been held that such regulations were not rendered inapplicable to distributors so engaged merely because the effect was to prevent agencies of the Federal Government from purchasing milk at less than prices established as reasonable and necessary by the State in the course of its regulation.

In *Milk Control Board v. Gosselin's Dairy*, 301 Mass. 174, 16 N. E. (2d) 641, the Court held that an order of the Massachusetts State Milk Control Board establishing minimum prices for the sale of milk to sales of milk to a United States Government Veterans' Hospital which happened to be located upon and within the jurisdictional limits of the State.

Although the above case would not support an attempt on the part of the State of California to fix the price at

which milk sales or deliveries might be made in a federal area such as Moffett Field or the San Francisco Presidio, we maintain that the case does fully support the proposition that the State in the exercise of its police power can by appropriate legislation, such as the 1941 addition to section 736.3 of the Agricultural Code, reach acts of milk distributors occurring within the jurisdiction of the State, even though the practical effect of such statute is to interfere to some extent with the functioning of an instrumentality of the United States.[46]

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[46]The Court said:

"It is conceded of course, fully and ungrudgingly, that a State cannot attempt to regulate an instrumentality of the United States or impose burdens upon it which interfere with its operation and efficiency. On the other hand we apprehend that an institution of the Federal Government situated within a State cannot wholly escape every consequence arising from a fact so pervasive and insistent as is the fact of location in the midst of a civilized community whose orderly existence and continuance are derived from and supported by another sovereignty of general powers. In this case certain facts stand out. The legislation of this Commonwealth is not directed against the veterans' hospital at Northampton. If the objects stated in the preamble are realized that hospital will benefit in common with the community in general. Conversely, if dealers are to be free to ignore the law in dealing with the hospital, the whole plan will suffer proportionately. There is no discrimination against the hospital. It can buy milk as others buy milk and at any price which competition may fix not lower than the established minimum. No burden upon it can result, even indirectly, which does not likewise fall upon all users of milk, including institutions of this Commonwealth of comparable nature. No attempt is made in the law, or in the order of the board, or in this litigation to control or to give any order or direction to the veterans' hospital or to any of its officers. The incidence of the law is upon dealers in milk. Although enforcement of the law against such dealers may in fact affect the price of milk to the hospital as well as to others, yet that result is in its nature incidental and collateral rather than immediate and direct. No doubt a careful search would reveal many statutes enacted for the protection of the people of this Commonwealth against fraud, disease, accident or other evils

D. THE ONLY ALLEGED BURDEN ON THE GOVERNMENT IS THAT OF INCREASED COST WHICH UNDER THE AUTHORITIES DOES NOT CONSTITUTE AN UNCONSTITUTIONAL BURDEN OR INTERFERENCE.

It may be true that as a result of the regulation the Government will be unable to purchase milk at prices less than those which other consumers will be required to pay,

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the enforcement of which no less certainly has the effect of raising prices paid by Federal agencies. * * *

"Instrumentalities of the Federal government are constantly increasing in number and importance throughout the several States. Their contracts with the surrounding inhabitants of the States are constant and innumerable. If residents of the States are to be released from their obligations to obey State laws whenever in the course of these contracts it is for the moment advantageous to the Federal agency that they should be released, the time may arrive when in the aggregate the encroachment upon the public order of the States will become substantial. And in this connection it should also be remembered that the Federal agencies may seldom have complete power and will almost never be under the obligation to establish new regulations for the protection of the public in place of those which, in so far as concerns them, they set aside."

See, also:

Paterson Milk and Cream Co., Inc. v. Milk Control Board, 192 Atl. 838, 118 N. J. Law. 383 (involving applicability of minimum milk price regulation to distributors supplying Federal agency);

James v. Dravo Construction Co., 302 U. S. 134, 160 (Oct., 1937). (involving applicability of State gross receipts tax to an independent contractor engaged in work for the Federal Government);

Stewart and Co. v. Sadrakula, 369 U. S. 94, 104 (involving applicability of State building and construction statute to a contractor engaged in work for an instrumentality of the Federal Government);

Alabama v. King and Boozer, 62 S. Ct. R. 43, 314 U. S. 1 (involving sales tax on persons having cost-plus-a-fixed-fee contracts with the Government to construct an army camp);

Baltimore & A. R. Co. v. Lichtenberg, 176 Md. 383, 4 Atl. (2d) 734 (1939), appeal dismissed for want of substantial Federal question, *sub nom U. S. v. Baltimore & Annapolis R. R.*, 308 U. S. 525, 60 S. Ct. 297, 84 L. ed. ..... Cited in *Stewart v. Sadrakula, supra* (involving applicability of New York Labor Law on Federal post office site).

but that is merely an incidental result flowing from the valid exercise of the State's police power.

It was contended in the state court that if this action had not been filed the performance of the petitioner's contract with the Government would have been directly interfered with and interrupted by the action of the State Department of Agriculture, and further, that respondent seeks to withdraw from the United States access to necessary supplies with which to feed its troops unless the terms of the Act are first complied with.

The fears thus expressed are more apparent than real. The fact is that in every case where the Government has called for bids (at least to the date of the commencement of this proceeding) a number of distributors have presented bids. There is no suggestion in the record, nor can it be contended, that the United States would be deprived of access to necessary supplies with which to feed its troops. The supply is, and has been at all times up to the present, adequate to take care of the needs of the Government and had petitioner's contract been interfered with by the Department of Agriculture there were, and are, other distributors ready and able to supply the Government with the milk it needs.

It is evident therefore that the only alleged burden upon the Government is that of increased cost. But this burden, it was contended, is neither theoretical nor speculative, but is actual and substantial.

That the amount involved over a period of time in the various military reservations situated in this State will be substantial is not denied. In the instant case, alone, the amount is negligible. However, the question is not whether it is substantial in that sense but whether the alleged

burden is unreasonable so as to constitute an unconstitutional interference with governmental functions.

In reckoning the incidental increased cost of milk to the Government by reason of the state regulation the benefits derived from that regulation should also be taken into account. As we have pointed out, the Milk Control Law is a health measure, the ultimate design and purpose of which is to insure an adequate and continuous supply of pure and healthful milk. If the purpose of the statute is maintained there can be no question that the Government in common with all other consumers will share the benefits. If the purpose of the statute is defeated, the Government will likewise share the consequences of such defeat. If distributors are to be released from the obligation of conforming to the price regulations because for the moment it appears advantageous to the federal agencies that they should be released, the very conditions which the statute was designed to prevent will again arise. Distributors will engage in cut-throat competition which will assuredly result, as it has in the past, in their inability to pay producers. Producers in turn will be forced to relax their sanitary standards or will be forced out of business altogether. Both the quality and quantity of the public milk supply may suffer to such an extent as to actually interfere with the governmental functions of the United States. While it might appear that under the State regulations the Government will presently be required to pay more for its milk, surely in the long range view of the matter it will be to the benefit and advantage of the Government, financially and otherwise, to have the regulation maintained.

The Government in procuring its milk for Moffett Field, the same as for all its other enclaves in California,

depends upon that State to protect the sanitary conditions, purity and wholesomeness of that milk by means of adequate regulation. If in the instant case the milk in question had come from tubercular cows or contained an excess bacteria count, the Government would have depended upon the State to prevent appellant from delivering such milk and would have blamed the State if it had failed to give such protection. All such sanitary regulations entail additional costs which add that much to the price the Government as well as any other consumer must pay for milk.

We venture to say that not for one minute would any claim have been made that appellant was free from such regulation and could handle and deliver such impure and infected milk because he was selling the same to the Federal Government and in a federal enclave. There is no difference in principle between such sanitary requirements and subdivision (6) so far as federal immunity is concerned.

Congress has not seen fit to provide adequate or any sanitary regulations to prevent delivery of impure milk in the federal enclaves in California nor any enforcement machinery to protect its milk supply, but has left the State free, and in fact depended upon it, to supply the protection.

To leave all those engaged in supplying milk to federal enclaves free from all state regulation would create a conditon of anarchy in the milk industry and subject the entire milk supply of the State to contamination. Such a situation is beyond contemplation.

The mere fact that the regulation may increase the cost to the Government does not invalidate the State statute.

Such is the holding of this Court in the more recent decisions.[47]

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[47] In *James v. Dravo Contracting Company*, 302 U. S. 134, at 160-1, the court said:

> "But if it be assured that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to the effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. In *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466, the taxpayer entered into a contract with the Federal Government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise tax on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct.' But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government. The fact that the tax of the gross receipts of the contractor in the *Alward* case, *supra*, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

In *Alabama v. King and Boozer*, 62 S. C. R. 43, 314 U. S. 1 (1941) the Court held that the Alabama sales tax as applied in connection with sales to persons having "cost-plus-a-fixed-fee" contracts with the United States to construct an army camp did not infringe any constitutional immunity of the United States.

The Court said in part:

> "So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties."

See also *Curry v. United States*, 62 S. C. R. 48 (Companion case to *Alabama v. King and Boozer, supra*, where the court said:

> "If the State law lays a tax upon them (contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through the operation of the contract."

So far as an unconstitutional burden upon, or interference with, a governmental function is concerned there is no distinction between such burden or interference imposed by a tax statute and one imposed by a regulatory statute.

The principal in either case is the same. That this is true appears to be clear from the case of *Stewart and Company v. Sadrakula*, 309 U. S. 94, where the court held a State police statute relating to the protection of employees on building construction applicable to a contractor engaged in the construction of a postoffice upon Federal territory. There, as in the tax cases, it was argued that the safety requirements of the statute would result in increasing the cost of construction to the Government.[48]

The more recent cases clearly establish the proposition that the mere incidental effect of increasing the price of milk to the Government does not operate to invalidate the statute.

E. The State Statute Does Not Run Counter to the Federal Bidding Statutes.

The contention has also been made that the State's price fixing authority cannot constitutionally be applied to Gov-

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[48]The court said (p. 104):

"In answer to the argument that a similar increased cost from taxation would 'make it difficult or impossible' for the government to obtain the service it needs, we said in James v. Dravo Contracting Co. that such a contention 'ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action.' Such a safety requirement is akin to the safety provisions of Maryland law which in Baltimore & Annapolis Railroad Co. v. Lichtenberg were held applicable to trucks of an independent contractor transporting government employees under a contract with the United States."

ernment purchases because to do so would conflict with Federal statutes requiring competitive bidding. (10 U. S. C. A. 1200 and 1201.)

The State Court pointed out that the Federal statute requires competitive bidding except in cases "where it is impracticable to secure competition."

The State Court also appears to have relied to some extent upon army regulation 5-240(g) to the effect that it is impracticable to secure competition "(3) when the price is fixed by Federal, State, Municipal or other competent authority". In the "Statement as to Jurisdiction" filed by appellant herein attention is called to the fact that the above mentioned regulation has been amended and the subsection (3) quoted by the court has been omitted. However, it does not appear that the court attached any great significance to that regulation or that its decision would have been otherwise had it been aware of the amendment.[49]

The same contention was urged by the Government in the *Penn Dairies* case and was rejected by the Pennsylvania court without any reference to the army regulation. The court quoted from *United States v. Brookridge Farm, Inc.* (10 Cir.) 111 F. (2d) 461, 463, as follows:

> "The purpose of these statutes and regulations is to give all persons equal right to compete for Govern-

[49] Prior to referring to the army regulation the court stated "The California Milk Control Act does not discriminate against the United States Army or substantially hinder its efficient operation. The army is not precluded from obtaining milk, nor required to pay more for such milk than other consumers in the same area. The act regulates not the army but the distributors who are independent contractors with the federal government. It is settled that such contractors are subject to state control, and that any consequent burden on the federal government is speculative and remote." (Citing cases.) [R. 25-6.]

ment contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition."

The court then went on to say that "The Milk Control Law contravenes neither the language of the statutes nor any of the above stated purposes. It does no more than put all bidders on an equal footing with regard to the minimum price and, as already pointed out, its primary purpose is to assume *responsibility* with all that the word implies."

The statute fixes only minimum prices and prior to the price freezing order of the O. P. A. distributors were permitted to bid any price they wished above such minimum prices.

The fact that due to competition in the industry a number, or all, of the bidders might submit identical bids on fluid milk is merely an incidental circumstance. It in no way interferes with the right or duty of federal officers of calling for bids.

Moreover the usual situation is that which was presented in the instant case, namely, that the invitation for bids includes not only milk, but also includes ice-cream, cottage cheese, buttermilk and the like, upon which prices are not fixed. In such a case the contract would be awarded to the distributor submitting the lowest aggregate bid on all the commodities called for in the invitation. It is clear therefore that the statute does not contravene the federal bidding statutes even if it be assumed that the latter require bidding where state statutes fix minimum prices.

IV.

The Ruling of the California Supreme Court That Commerce Between Moffett Field and "the Rest of the State" of California Is Interstate Commerce Was Unnecessary. In Any Event the State Statute Does Not Run Counter to the Commerce Clause of the Federal Constitution.

In this case the petitioner did not in its petition or otherwise contend that the California statute is in any manner violative of the Commerce Clause of the Constitution. This question was raised by the Court *sua sponte*. The parties were asked to submit briefs on the question as to whether milk shipped from California into Moffett Field is in interstate commerce and if it is, does the Agricultural Marketing Agreement Act of 1937 (50 U. S. Stats. 246) preclude the application of the California Milk Control Act to sales of milk in Moffett Field.

Counsel for the petitioner took the position that the question of interstate commerce was *not involved* in this proceeding.[50] However, the United States Attorney, as *amicus curiae*, took the position that commerce between a State and Federal territory situated within the geographical boundaries of the State constitutes interstate commerce.

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[50]In its "Additional Authorities on Petition for Writ of Mandamus" petitioner on page 2 thereof stated: "So the question of interstate commerce is not involved in our discussion of the present case and the Agricultural and Marketing Agreement Act of 1937 of the United States as far as military reservations are concerned, would be regulatory by the Government of its own territory, and not a regulation of interstate commerce."

Notwithstanding that this question was not an issue in the case and that a ruling thereon was unnecessary to the decision the Court proceeded to discuss the question and held that the power of Congress to regulate interstate commerce enables it to regulate commerce between such areas as Moffett Field and "the rest of the State" of California. The Court went on, however, to hold in substance that while such commerce could be regulated under the Commerce Clause the power so to do had not been exercised and that until such time as the Federal Government undertook to do so the State was free to regulate such commerce.

Since this whole question was not an issue in this proceeding the Court's discussion must be regarded merely as dictum, and it is very questionable whether this Court ought now to pass upon it. In this connection we refer the Court to the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Valley Authority*, 297 U. S. 288, at 346-347, and authorities there cited, setting forth a series of rules developed by the Court for its own goverance in cases confessedly within its jurisdiction, under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. Whether any of these rules are applicable to the present situation we leave to this Court to decide. We merely reiterate that the interstate commerce question was injected into the proceeding by the State court and not by the petitioner and further that after it was injected petitioner took the position that no question of interstate commerce was involved in the case.

Inasmuch as the Secretary of Agriculture has failed to establish any Federal milk marketing area for Moffett Field or for any other Federal enclave in California, we

take it that under the authority of *Parker v. Brown,* No. 46 this term, decided January 4, 1943, Congress having failed to occupy the field, the State is left free to act.

Moreover a realization of the number and nature of these Federal enclaves practically precludes the possibility, or at least feasibility, of such attempted Congressional regulation. Federal employees occupying offices in Federal buildings would be unable to secure deliveries of merchandise because local delivery services were without interstate commerce licenses. A hundred and one difficulties would arise to completely disrupt the ordinary and customary procedure.

The question whether commerce between a State and these Federal enclaves within the geographical boundaries is interstate commerce or not is one of vast importance to nearly every State in the Union. In view of the fact that appellant took the position in the court below that no question of interstate commerce was involved and that it has filed no brief in this appeal, and in further view of the fact that this is, so far as we know, a question of first impression in this Court, we believe that if this question is to be passed upon in this case a full opportunity to present the same should be afforded upon proper briefs filed by appellant with opportunity for respondent to reply thereto. And this, of course, becomes unnecessary in the event this Court concludes that the determination of such question is not required for a decision herein. As indicative of the scope of this problem we attach hereto as Appendix "E" a list of Federal acts applicable to interstate commerce and which would be called into consideration in every transaction moving from any part of a State into any one of these Federal enclaves.

Conclusion.

We respectfully submit that the State statute here in question does not conflict with any provision of the Federal Constitution nor with any Federal statute, but that on the contrary it is in all respects a valid and constitutional exercise of the police power of the State.

With the exception of the dictum holding commerce between the State and a Federal area within the State is interstate, the judgment of the State Supreme Court should be affirmed.

Respectfully submitted,

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EXTRACTS

FROM THE

AGRICULTURAL CODE OF CALIFORNIA

PERTAINING TO

GENERAL PROVISIONS AND STABILIZATION AND MARKETING OF FLUID MILK AND FLUID CREAM

REVISED TO SEPTEMBER 13, 1941

4543

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AGRICULTURAL CODE*

GENERAL PROVISIONS

Title

1. This act shall be known and may be cited as the "Agricultural Code."

Definitions

2. As used in this code, unless otherwise apparent from the context:

(a) The present tense includes the past and future tenses; and the future, the present.

(b) The masculine gender includes the feminine and neuter.

(c) The singular number includes the plural, and the plural the singular.

(d) "Department" means the Department of Agriculture of the State of California.

(e) "Director" means the Director of Agriculture of the State of California.

(f) "Commissioner" means any county agricultural commissioner.

(g) "Section" means a section of this code unless some other statute is specifically mentioned.

(h) "County" includes city and county.

(i) "Person" includes firm, corporation, company, or association.

(j) "Sell" includes "offer for sale," "expose for sale," "have in possession for sale," "exchange," "barter" or "trade."

Construction and effect

3. The provisions of this code, in so far as they are substantially the same as existing law, shall be construed as continuations thereof and not as new enactments.

4. All persons who, at the time this code goes into effect, hold office under any of the acts repealed by this code, which offices are continued by this code, continue to hold the same according to the former tenure thereof.

5. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible.

Enforcement

6. Any person in whom the enforcement of any provision of this code is vested has the power of a peace officer as to such enforcement.

Prosecution

7. The district attorney of any county in which a violation of any provision of this code occurs shall, upon request of any enforcing officer or other interested person, prosecute

* The Agricultural Code was enacted by the Fiftieth California Legislature, being Chapter 25, Statutes of 1933, and entitled, "An act to establish an Agricultural Code, thereby consolidating and revising the law relating to plant and animal industry and the products thereof, and to repeal certain acts and parts of acts specified herein." (In effect August 21, 1933.)

Any additions to, repeals or amendments of, the provisions of the code will be indicated by reference to chapter number under which they were enacted by the Fiftieth, Fifty-first, Fifty-second, Fifty-third, and Fifty-fourth Legislatures.

such violation; and the prosecutor of any municipality has concurrent jurisdiction as to any violation committed within his territorial jurisdiction.

General penalty

8. Unless a different penalty is expressly provided, a violation of any provision of this code is a misdemeanor.

9. Whenever any notice, report, statement or record is required by this code it shall be in writing unless it is expressly provided that it may be oral.

10. Whenever any notice, report, statement or record is required by this code to be kept or made in writing it shall be in the English language.

11. Unless otherwise specifically provided, whenever any document is required or permitted by this code to be recorded it shall be recorded in the office of the county recorder of the county in which the property or thing affected is situated.

12. Whenever any power or authority is given by any provision of this code to any person it may be exercised by any deputy, inspector, or agent duly authorized by him unless it is expressly provided that it shall be exercised in person.

13. Whenever any reference is made to any section of this code or to any other law, such reference shall apply to all amendments and additions thereto.

14. As used in this code the word "shall" is mandatory, and the word "may" is permissive.

15. The director may enter upon any premises to inspect the same or any plant, appliance or thing thereon.

Rules and regulations authorized

16. The director is hereby authorized to promulgate and adopt rules and regulations for carrying out those provisions of this code which he is directed and authorized to administer or enforce.

(Added by Ch. 723, Stats. 1933.)

DIVISION 4. DAIRIES AND DAIRY PRODUCTS

CHAPTER 10. STABILIZATION AND MARKETING OF FLUID MILK AND FLUID CREAM *

(Heading added by Ch. 241, Stats. 1935.)

Article 1. General Provisions

735. (a) The production and distribution of fluid milk and of fluid cream and the dissemination of accurate scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State. Public interest

(b) It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threatens to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to Legislative declaration

* (NOTE.—All of the sections of this chapter changed by Ch. 3, Stats. 1937, were subject to the following sections of said Chapter 3:
SEC. 21. If any provision of this act, or the application thereof to any person or circumstance is held invalid, the remainder of this act, or the application of such provision to any other person or circumstance, shall not be affected.
SEC. 22. All stabilization and marketing plans in effect on the effective date of this act, and all rights and liabilities accruing under such plans shall not be affected by this act, but such plans may be superseded at any time by a plan formulated as prescribed in said Chapter 10 of Division 4 of the Agricultural Code as amended by this act.
SEC. 24. This act is hereby declared to be an urgency measure necessary for the immediate preservation of public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution and shall therefore go into immediate effect. The statement of the facts constituting such necessity is as follows:
The economic conditions of fluid milk producers throughout the State are such as to require immediate relief if their purchasing power and taxpaying ability are to continue and their morale and standard of living are not to be undermined. Such relief can be afforded only by the orderly production and marketing of fluid milk and fluid cream. The provisions herein contained are necessary in order to prevent the further demoralization of the fluid milk and fluid cream industries.)

its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

(c) It is recognized by the Legislature that conditions within the milk industry of this State are such that it is necessary to establish marketing areas wherein different prices and regulations are necessary; and for that purpose the Director of Agriculture of this State shall have the administrative authority, with such additional duties as are being prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

Definitions (d) The foregoing statements of facts, policy and application of this law are hereby declared a matter of legislative determination.

(Added by Ch. 244, Stats. 1935; amended by Ch. 3, Stats. 1937.)

735.1. The purposes of this chapter are to:

Purposes (a) Provide funds for administration and enforcement of this act, by assessments to be paid by producers of fluid milk or fluid cream, or both, and from licenses issued to distributors in the manner prescribed herein.

(b) To authorize and enable the director to prescribe marketing areas and to determine prices to producers for fluid milk or fluid cream, or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State, provided that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions.

(c) To authorize and enable the director to formulate stabilization and marketing plans subject to the limitations herein prescribed with respect to the contents of such stabilization and marketing plans and declare such plans in effect for any marketing area.

(d) Enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream and provide means for carrying on essential educational activities.

It is the intent of the Legislature that the powers herein conferred shall be liberally construed. Nothing in this chapter shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream. In the establishment of the terms and conditions under which fluid milk and fluid cream shall be purchased from producers, and under which distributors and retail stores shall sell and distribute the same, such terms and conditions shall be those which will, in the several localities and markets of the State and under the varying conditions of production and distribution insure an adequate and

continuous supply of pure fresh wholesome fluid milk and fluid cream to consumers thereof at fair and reasonable prices.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

735.2. The director shall enforce the provisions of this chapter and any stabilization and marketing plan or marketing agreement initiated pursuant to the provisions of this chapter, and for that purpose may make such rules and regulations as he deems necessary. Enforcement

(Added by Ch. 241, Stats. 1935.)

735.3. As used in this chapter:

(a) "Board" means any local control board created as herein authorized.

(b) "Fluid milk" means any and all whole milk that is produced in conformity with applicable health regulations for market milk of the place where such milk is consumed and for the purpose of this chapter fluid milk may be classified as follows:

Class 1. Any such milk that is supplied to consumers in the form of whole milk, which shall include "raw milk"; "pasteurized milk"; "homogenized milk"; "condensed milk," "evaporated milk," and "modified milk," that is prepared from whole fluid milk and which is not packaged in hermetically sealed containers; fluid milk containing added vitamins or flavoring; that portion of fluid milk used as whole milk in any combination of fluid milk and fluid cream containing a milk-fat content in excess of the minimum statutory requirements for fluid milk and less than the minimum statutory requirement for "cream," and includes milk-fat used in the standardization of Class 1 fluid milk; Classes of fluid milk

Class 2. Any such milk or the cream derived therefrom that is sold or disposed of by distributors for consumption as cream, as cream is defined in this code, including cream in any combination of fluid milk and fluid cream containing a milk fat content in excess of 6.0 per cent and less than the minimum statutory requirements for cream;

Class 3. Any such milk or the cream derived therefrom, as cream is defined in this code, that is sold or disposed of by distributors in any form not included in Classes 1, 2 or 4;

Class 4. Any such milk or the cream derived therefrom, as cream is defined in this code, that is used by distributors in the manufacture of butter and cheese other than cottage cheese.

In designating and prescribing or providing methods for designating and prescribing minimum prices to be paid by distributors to producers for Classes 2, 3 or 4 fluid milk, the director may take into consideration the market price of all milk which may be used for the same purposes set forth in such respective classes.

(c) "Fluid cream" means any and all cream defined in this code as cream and which conforms to the health and sanitary regulations of the place where such cream is to be sold or

disposed of for human consumption as cream; provided, however, that the cream derived from the separation of Class 2 fluid milk shall not be considered as fluid cream except that such cream when packaged as cream shall be subject to all of the terms and provisions of orders of the director establishing minimum wholesale and minimum retail prices for fluid cream.

(d) "Dairy products" includes any product manufactured from milk or any derivative or product of milk.

"Producer": Definition

(e) "Producer" means any person who produces fluid milk or fluid cream from five or more cows or goats in conformity with the applicable health regulations of the place in which it is sold, and whose fluid milk or fluid cream is received or handled by any distributor. "Producer" includes any association of producers.

"Distributor": Definition

(f) "Distributor" means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations. The definition of "distributor" shall not include any of the following: (1) Any retail store that is not engaged in processing and packaging fluid milk or fluid cream, (2) any establishment where fluid milk or fluid cream is sold only for consumption on the premises, that is not engaged in processing and packaging fluid milk or fluid cream, (3) any person owned or controlled by one or more retail stores, or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream, (4) any producer who delivers fluid milk or fluid cream only to a distributor.

"Producer-distributor": Definition

(ff) "Producer-distributor" means any person who is both a producer and a distributor of fluid milk or fluid cream. For the purposes of this chapter a producer-distributor shall be deemed to be a producer in any transaction involving the delivery of fluid milk or fluid cream produced by him to a distributor, and shall be deemed to be a distributor in any transaction involving the delivery of fluid milk or fluid cream to a person who is not a distributor as defined in this section.

"Retail store": Definition

(g) "Retail store" means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

(h) "Marketing area" is any area within this State declared to be such in the manner prescribed in this chapter.

(i) "Stabilization and marketing plan" means any plan formulated and made effective by the director within the legislative standards provided by this chapter and shall include, among other things the establishing of prices to be paid by distributors for any or all of the various classes of fluid milk or fluid cream.

(j) "Consumer" means any person who purchases fluid milk, fluid cream or dairy products for consumption.

(k) "Person" means any individual, firm, corporation, association or any other business unit.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 57, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

735.4. (a) The director shall have and may exercise any or all the powers conferred by Section 353 of the Political Code upon the head of a department of the State with respect to hearings and investigations under this chapter. Powers of director

(b) The director is hereby declared to be the instrumentality of this State for the purpose of administering and enforcing the provisions of this chapter and to execute the legislative intent herein expressed, and is hereby vested with the administrative authority:

(1) To investigate any and all transactions between producers and distributors or among distributors or between distributors and retail stores or between distributors and consumers or between retail stores and consumers, and for that purpose the director or his authorized agents shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured, or where milk or milk products are being bought, sold or handled, or where the books, papers, records or documents relating to such transactions are kept, and shall have power to inspect and copy the same in any place within the State.

(2) To issue licenses to distributors and require the registration of producers.

(3) To formulate any stabilization and marketing plan as prescribed in this chapter and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the director, affected by such plan.

(4) To prescribe minimum prices to be paid by distributors in accordance with a stabilization and marketing plan for fluid milk and classify said milk according to usage by distributors; provided, that the prices so prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above such costs incurred in producing and marketing manufacturing milk.

(5) To prescribe minimum prices to be paid by distributors for fluid cream in accordance with a stabilization and marketing plan; provided, that the prices so prescribed shall be based upon the economic relationship of the price of fluid cream for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid cream over and above such costs incurred in producing and marketing manufacturing milk.

(6) (a) To amend or terminate any stabilization and marketing plan, after notice and public hearing as prescribed in Section 736.1, in the event that he finds that such plan is no longer in conformity with the standards prescribed in, or will not tend to effectuate the purposes of, this chapter. Such hearing may be held upon the motion of the director and shall be held upon receipt of a petition signed by producers representing not less than 55 per cent of the total number of all producers and not less than 55 per cent of the total production of all producers who are eligible to petition the director for the formulation of such plan.

(b) To amend, after notice and public hearing called and held in the same manner as provided in Section 736.12, any minimum wholesale and retail prices established under the provisions of Article 2a of this chapter, in the event that he finds that any such price is, or that any such prices are, no longer in conformity with the standards prescribed therefor, or will not tend to effectuate the purposes of this chapter.

(c) To terminate any such minimum wholesale and retail prices without notice or hearing at any time that there is no stabilization and marketing plan in force and effect in such marketing area.

(7) To appoint a local control board for any marketing area, in the event that he deems such board necessary or advisable.

(8) To remove any member from a local control board in the event that he finds such member, after hearing, is guilty of nonfeasance or malfeasance in office.

(9) To appoint a member to fill a vacancy on a local control board.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

735.5. A full and accurate record of business or acts performed or of testimony taken by the director in pursuance of the provisions of this chapter shall be kept and placed on file in the office of the director.

(Added by Ch. 241, Stats. 1935.)

Review 735.6. Any order of the director hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within 30 days after the effective date of the order complained of or within 30 days after the injurious effect complained of becomes reasonably apparent.

(Added by Ch. 241, Stats. 1935.)

Injunction 735.7. The director may bring an action to enjoin the violation or the threatened violation of any provision of this chapter or of any order made pursuant to this chapter in the superior court in the county in which such violation occurs or is about to occur. There may be enjoined in one proceeding any number of defendants alleged to be violating the same provisions or orders, although their properties, interests, residence, or place of business, may be in several counties and the

violations separate and distinct. Any proceeding brought hereunder shall be governed in all other respects by the provisions of Chapter 3 of Title 7 of Part 2 of the Code of Civil Procedure.

(Added by Ch. 241, Stats. 1935.)

Other powers of director

735.8. The director may confer, enter into agreements, or otherwise arrange with the constituted authorities of this State, other States, or agencies of the United States with respect to plans relating to the stabilization and distribution of fluid milk and fluid cream within this State or as between this State and other States or the United States, and may exercise his powers hereunder to effectuate and enforce such plans.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Moneys

735.9. All money received by the director hereunder shall be paid monthly into the State Treasury to the credit of the "Department of Agriculture Fund."

(Added by Ch. 241, Stats. 1935.)

Article 2. Stabilization and Marketing Plans

(Heading amended by Ch. 3, Stats. 1937.)

Designation of milk marketing areas

736. As soon as possible after the effective date of this chapter the director shall designate marketing areas which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform. The director shall have the power to establish additional areas or to modify areas theretofore established when he deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of this chapter.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Hearing procedure—Stabilization and marketing plan

736.1. The director shall, prior to the formulation of a stabilization and marketing plan for fluid milk for any marketing area, conduct a public hearing in said area for the purpose of determining whether or not producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 per cent of the total volume of the fluid milk produced for said marketing area by all such producers, desire that a stabilization and marketing plan for fluid milk be formulated for said area; but if a petition is presented to the director by the producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area and who produce not less than 65 per cent of the total

volume of the fluid milk produced for said marketing area by all such producers, it shall not be necessary that such hearing be held.

The director shall, prior to the formulation of a stabilization and marketing plan for fluid cream for any marketing area, conduct a public hearing in said area for the purpose of determining whether or not producers whose major interest in the fluid cream business is in the production of fluid cream for said marketing area and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid cream business is in the production of fluid cream for said marketing area and who produce not less than 65 per cent of the total volume of fluid cream produced for said marketing area by all such producers, desire that a stabilization and marketing plan for fluid cream be formulated for said area; but if a petition is presented to the director by producers whose major interest in the fluid cream business is in the production of fluid cream for said marketing area and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid cream business is in the production of fluid cream for the marketing area and who produce not less than 65 per cent of the total volume of fluid cream produced for said marketing area by all such producers, it shall not be necessary that such hearing be held.

If the director finds that a stabilization and marketing plan is necessary to accomplish the purposes of this chapter, he shall formulate a stabilization and marketing plan for fluid milk or fluid cream or both for such area and issue a notice of public hearing upon the plan formulated to all producers and distributors of record with the Department of Agriculture who may be subjected to the provisions of such plan. The notice of hearing may be effected by mail, or by publication for five successive days in a newspaper of general circulation in the area designated and shall specify the time and place of such hearing, which shall not be held prior to 10 days from the mailing, or from the final publication of such notice; provided, however, that if no daily newspaper of general circulation is published in the area designated, publication of notice for two successive weeks in a weekly newspaper of general circulation in the area will be considered proper publication of notice. At the hearing, interested parties shall be heard and records kept of the proceedings of such hearing for determination by the director whether the plan proposed will accomplish the purposes of this chapter. If, after public hearing the director determines that the proposed plan will tend to accomplish the purposes of this chapter within the standards herein prescribed, he shall issue an order to all producers and distributors of record with the director, and subject to the provisions of such plan, declaring such plan in effect within 30 days from the date of such hearing.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939.)

Local control boards—producers

736.2. The director may appoint local control boards for the marketing areas established as prescribed herein to assist and advise him in matters pertaining to the production and marketing of fluid milk or fluid cream or both or to the operation of a stabilization and marketing plan. The board shall consist of seven members who shall be producers who supply fluid milk or fluid cream to the particular marketing area. The term of office of each such member shall be two years, unless the plan is terminated before said term expires. Said local board shall meet in regular session each month, and each member shall be allowed five dollars ($5) per diem and mileage at the rate of five cents ($0.05) per mile for attending such regular meetings. Said board with the previous approval of the director may employ such personnel as may be necessary in the performance of its duties and shall adopt rules and regulations for its conduct. The board shall submit a budget of its expenses to the director for his approval. The funds to be used for the maintenance of the board shall be paid from the proceeds of assessments and licenses paid to the director under the plan upon verified claims presented by the board to the director. The board shall not incur any expenses other than those for per diem and mileage, unless approved by the director.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Provisions of marketing plan

736.3. Any stabilization and marketing plan shall contain the following provisions:

(a) Provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

Unfair practices

(1) The payment, allowance or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

(2) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream business of any customer.

(3) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream of like quantity under like terms and conditions.

(4) The false or misleading advertising of fluid milk or fluid cream as defined in Section 654a of the Penal Code.

Contracts

(5) The purchase of any fluid milk in excess of 200 gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers stating the amount of fluid milk to be purchased for any period; the quantity of such milk to be paid for as Class 1, and the price to be paid for each of the several classes, but in any marketing area where an equalization pool is a part of a stabilization and marketing plan, such contract need not specify the quantity of milk in any one class. The contract shall also state the date and method of

payment, the charges for transportation if hauled by the distributor, and may contain such other provisions as are not in conflict with this chapter, and shall contain a proviso to the effect that the producer shall not be obligated to deliver in any calendar month fluid milk to be paid for at the minimum price for fluid milk that is used for Class 4, as said class is defined in Section 735.3 of this code. A signed copy of such contract shall be filed by the distributor with the director within five days from the date of its execution.

(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area; whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

(7) The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

(8) The purchasing or receiving of any fluid milk or fluid cream by distributors from producers within a marketing area wherein a stabilization and marketing plan is in effect for less than the minimum prices established in such plan, regardless of whether such milk or cream is subsequently sold or distributed within or without such marketing area, or within or without the jurisdiction of the State of California; provided, however, that if such fluid milk or fluid cream is subsequently sold or distributed in another marketing area within the State of California where a stabilization and marketing plan is in effect, then the distributor shall pay the producer thereof not less than the minimum prices established in such plan in the marketing area wherein such milk or cream is sold or distributed; and provided further, that in the event such fluid milk or fluid cream is subsequently sold or distributed in any place within the jurisdiction of the State of California where no stabilization and marketing plan is in effect, then such milk or cream may be paid for by the distributor to the producer thereof at not less than the average price paid by distributors to producers for milk or cream of similar grade and quality at the plants in the vicinity where such milk or cream is so sold or distributed, as such prices are determined by the director from contracts required to be filed with him pursuant to this section.

Minimum milk prices to producers

(b) Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers, for

fluid milk in one or more of the various classes; provided, however, that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above costs incurred in producing and marketing manufacturing milk; and provided further, the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome milk.

Any stabilization and marketing plan may contain the following provisions:

Report of milk received

(c) Provisions whereby distributors shall report to each producer from whom fluid milk is secured, the volume of fluid milk received from such producer in pounds of milk, the milk fat test of such milk and the amount of fluid milk in milk fat pounds paid for in the several classes and the prices paid for the various classes for each month.

Minimum cream prices to producers

(d) Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers for fluid cream; provided, that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid cream for the marketing area involved to the price of manufacturing cream, taking into consideration the additional costs incurred in producing and marketing fluid cream over and above costs incurred in producing and marketing manufacturing milk; and provided further, that the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome cream.

Equalization pools

(e) Provisions whereby the director designates or prescribes methods to provide uniform prices to be paid to all producers supplying fluid milk to distributors for pasteurization purposes in the marketing area involved by pooling the returns of all such fluid milk; provided, that no equalization pool shall be established unless the director, after hearing, determines that producers who supply distributors with not less than sixty-five (65) per cent of the total volume of fluid milk used for pasteurization purposes and who represent not less than sixty-five (65) per cent of the total number of such producers desire the establishment of such pool, but no hearing shall be necessary if said sixty-five (65) per cent, by volume and production, of such producers petition the director in writing to establish such equalization pool as a part of the plan. If the director finds that an equalization pool is necessary to carry out the provisions of this chapter he shall make provision therefor. The director may designate the local control board for the marketing area as his agency to operate the equalization pool and may permit such local board to employ a pool manager and such other necessary personnel

and to incur such expenses incidental to the operation of the pool as the director finds are necessary. The director is hereby empowered to require distributors to make reports to the pool manager at such intervals and in such detail as he finds is necessary for the operation of the pool which reports shall be kept confidential as to any individual distributor but shall be available to the director or his agents and the pool manager, and such employees of the pool as are necessary to the operation of the equalization pool.

No provision of any pooling program shall prevent any distributor from paying premiums for quality; provided, all producers supplying fluid milk of like quality to such distributor are paid similar premiums, nor shall any provision prohibit the paying of different prices to producers based on differentials in transportation, adjustments or deductions made by a cooperative association of producers to its members, including the blending of proceeds received from the sale of fluid milk by such cooperative in other markets. Distributors who purchase fluid milk from producers for pasteurization purposes shall deduct from payments due such producers at such time and in such manner such sums as the director determines are sufficient to insure uniform prices to all producers subject to the provisions of the equalization pool, irrespective of the usage of such fluid milk by the distributors. Distributors shall make, in addition to the deductions herein prescribed, such additional deductions per pound milk fat as the director finds necessary to pay all expenses incidental to the operation of the equalization pool, including the establishment of a reserve account to insure prompt payments to producers. The deductions herein prescribed are in addition to any other deductions prescribed by this chapter.

Sales stimulation or consumer educational programs

(f) Provision whereby sales stimulation or consumer educational programs may be formulated and administered to increase the consumption of fluid milk and fluid cream, or other dairy products; provided, that such programs shall be carried on without reference to a particular brand or trade name; and provided further, that no such sales stimulation or consumer educational program shall be carried on which shall make use of false or unwarranted claims on behalf of such products or which disparages the quality, value, sale or use of any fluid milk or fluid cream or any other agricultural commodity authorized by law to be marketed within such marketing area.

Before any stabilization and marketing plan may provide for sales stimulation and consumer educational programs, not less than 65 per cent of the producers and who produce not less than 65 per cent of the total volume of fluid milk consumed in any marketing area shall petition the director in writing for the inclusion of such a program as part of the stabilization and marketing plan. If such a program is requested by distributors it shall be necessary that not less than 65 per cent of the total number of distributors and who

distribute not less than 65 per cent of the total volume of fluid milk for consumption in the marketing area shall petition the director in writing for the inclusion of such a program as part of the stabilization and marketing plan.

The petition shall bear the signatures of petitioners, their addresses and the approximate daily volume of fluid milk handled in gallons and milk-fat pounds and the type of product distributed, together with the estimated cost of the program each month and the number of months the program is to continue in operation.

A sales stimulation and consumer educational program instituted by producers shall be financed by all producers supplying fluid milk to the marketing area. Such program, if instituted by distributors, shall be financed by all distributors supplying fluid milk to the marketing area. If such program is instituted by both producers and distributors, both producers and distributors shall finance the program equally.

If the program is instituted by producers the director is hereby empowered to require producers to pay assessments of not more than two mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than seven mills for each 10 gallons of fluid milk received by distributor, including the production of distributors who are also producers.

If the program is instituted by distributors the director is hereby empowered to require distributors to pay assessments of not more than two mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than seven mills for each 10 gallons of fluid milk received by distributors, including the production of distributors who are also producers.

If the program is instituted by both producers and distributors, the director is hereby empowered to require both producers and distributors to pay assessments for the purpose of providing funds for formulating, administering, and carrying on such program. The assessments to be paid by distributors shall not exceed two mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than seven mills for each 10 gallons of fluid milk received by distributors including the production of distributors who are likewise producers. Assessments of not more than two mills per pound milk fat, or if the program is instituted upon a gallonage basis, not more than seven mills for each 10 gallons of fluid milk produced by producers and received by distributors, shall likewise be paid by producers. In no instance shall the combined assessments exceed four mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than 14 mills for each 10 gallons of fluid milk received from producers and processed by distributors for distribution in the marketing area in the form of whole milk, fluid cream, or manufactured dairy products derived from fluid milk.

Before a program may be instituted a public hearing shall be called by the director; the procedure for which public hearing is to be the same as that required for the institution of a stabilization and marketing plan for fluid milk. At such public hearing testimony and evidence shall be taken to determine the necessity of such a program, the estimated costs of the program, the time during which the program is to be continued, and such other matters as are necessary in the institution of the program.

If, after public hearing and consideration of the testimony and evidence presented at said hearing, the director finds that a sales-stimulation and consumer educational program will tend to effectuate the purposes of this chapter, he shall issue an order making effective such program. Such order shall state the number of months the program shall continue in operation, the rate of assessment per pound milk fat or per gallon to be paid by those petitioning for the program, the names, addresses and business locations of the persons appointed to administer the program and such order may contain other provisions which are necessary and incidental to the operation of the program.

The person named in the order to administer the program shall be selected by the director in the following manner and in the following number:

(a) If the program was instituted by producers the director shall name five representative producers from nominations made at the public hearing by the petitioners.

(b) If the program was instituted by distributors the director shall name five representative distributors from nominations made at the public hearing by the petitioners.

(c) If the program was instituted by both producers and distributors the director shall name three representative producers from nominations made at the public hearing by the petitioning producers and three representative distributors from nominations made at the public hearing by petitioning distributors.

(d) Distributors who are also producers shall be eligible to nomination for service on, and may be named by the director to serve on the committee to administer any program for which they will be required to pay assessments, and at least one of the persons named by the director to serve on any committee to administer any program for which distributors who are also producers will be required to pay assessments shall be a distributor who is also a producer.

All programs shall be administered by the persons named in the order of the director making the program effective, and shall be administered subject to the approval of the director. All amounts required to be paid to the director under this section by producers or distributors shall be paid to such director on or before the fifteenth day of the month following the month during which such fluid milk was received by distributors and all distributors receiving milk from producers in any area where the provisions of this section are in effect

whereby the director is empowered to require payments from producers shall deduct and pay to the director such payments provided for under this section from the payments due for such distributors to such producers for fluid milk.

Upon the termination of any program, if there are any obligations arising thereunder, the final accrual or ascertainment of which requires further acts by any producer or distributor or by the persons appointed to administer the program or by the director, the power or duty to perform such further acts shall continue, notwithstanding such termination.

All moneys received by the director pursuant to this section shall be deposited in the Department of Agriculture Fund in the State Treasury allocated to each separate marketing area from which they are collected and disbursed only for the purposes specified subject to the approval of the director.

Any money received by the director in excess of the amount required for any program shall be returned at such time as the director may determine on a pro rata basis to the persons from whom such funds were collected.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 710, Stats. 1937; by Ch. 1214, Stats. 1941.)

736.4. No distributor subject to the provisions of any stabilization and marketing plan shall purchase milk from producers who do not comply with the provisions of this chapter and such plan. No such plan shall involve a limitation upon the production of fluid milk or fluid cream.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

(Secs. 736.5, 736.6, 736.7, added by Ch. 241, Stats. 1935, repealed by Ch. 3, Stats. 1937.)

Article 2a. Minimum Wholesale and Retail Prices

(Heading added by Ch. 413, Stats. 1937.)

736.10. Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale prices and minimum retail prices as hereinafter set forth. Authority of director

(Added by Ch. 413, Stats. 1937.)

736.11. The director shall, as soon as possible after the effective date hereof, in all marketing areas wherein a stabilization and marketing plan is in effect under the provisions of this chapter, designate and prescribe or provide methods for designating and prescribing,

(a) Minimum wholesale prices, which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold Wholesale prices

by distributors to retail stores owned or operated by such distributor; and

Retail prices

(b) Minimum retail prices which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

At the time any stabilization and marketing plan is hereafter established under the provisions of this chapter, the director shall designate and prescribe, or provide methods for designating and prescribing, such minimum wholesale prices and such minimum retail prices; provided, however, that all prices established under the terms of this article shall be such prices as are determined by the director pursuant to the provisions of Section 736.12.

(Added by Ch. 413, Stats. 1937.)

Investigation

736.12. In determining minimum wholesale prices and minimum retail prices in any marketing area, the director shall first make an investigation in such marketing area to establish such facts as shall be necessary to permit him to carry out the intent of this article within the standards herein prescribed.

In making such investigation, the director may examine the books and records of distributors and retail stores in such marketing area and shall hold one or more public hearings, take testimony and may subpena witnesses. All testimony received at such hearings shall be under oath. Notice of any hearing held by the director, pursuant to this article, shall be given by the director to every distributor and retail store in such marketing area whose name appears upon the records of the Department of Agriculture or who files a request for the same with the department, by mail or by publication for the time and in the manner prescribed in Section 736.1 of this chapter. A record of any and all hearings held by the director, pursuant to this article, shall be made and filed in the office of the director and shall, at all times, be available to inspection by any interested person.

Economic factors to consider

In determining minimum wholesale and minimum retail prices for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area:

(1) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

(2) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

(3) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to this chapter.

(4) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors and retail stores, respectively, including all costs of hauling, processing, selling and delivering by the several methods used in such marketing area in accomplishing such hauling, processing, selling and

delivery, as such costs are determined by impartial audits of the books and records, or surveys, or both, of all, or such portion of the distributors and retail stores, respectively, of each type or class in such marketing area as are reasonably determined by the director to be sufficiently representative to indicate the costs of all distributors and retail stores, respectively, in such marketing area.

In determining the cost of handling and distributing fluid milk or fluid cream, or both, by retail stores handling commodities in addition to fluid milk or fluid cream, or both, the director shall determine the cost of doing business for each such representative retail store and for such purpose shall consider all costs and expenses of doing business including depreciation on inventory and equipment. In the absence of satisfactory evidence to the contrary, the cost of handling such fluid milk or fluid cream, or both, shall be presumed to be the same percentage as the cost of doing business of such retail store in conducting its entire business.

(4a) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors in hauling, processing, selling, and delivering to restaurants, confectioneries or other places for consumption on the premises wherein it is required by law that service to customers be made from the original containers. In fixing the minimum wholesale price to be paid distributors by such persons, the director shall take into consideration such legal requirements and other factors and distribution costs peculiarly affecting service to such persons, and if the director reasonably determines that such factors and costs require that the minimum wholesale prices to be paid distributors by such persons vary from the minimum prices established for other wholesale customers, the prices established to be paid by such persons may vary accordingly.

(5) The amount of the available capacity for processing and distributing fluid milk, or fluid cream, or both, of all distributors in such marketing area and the estimated extent to which such available capacity is being used by such distributors.

(6) The purchasing power of consumers in such marketing area.

Establishment of prices.

Following such hearings, investigation and examinations authorized above, the director shall establish minimum wholesale and minimum retail prices for such marketing area, and shall declare such prices effective in the same manner as that prescribed in this chapter for declaring producer prices effective; provided, that the director finds, in writing, with respect to such prices:

(1) That such prices are not more than reasonably sufficient to cover all necessary costs, according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores engaged in the distribution of fluid milk, fluid cream, or

both, in such marketing area as such necessary costs of reasonably efficient distributors and retail stores are shown to the director by the facts available to the director from the investigations, surveys, audits, and hearings required in this section.

(2) That such prices will tend to maintain in the business of distributing fluid milk and fluid cream, or both, such number of reasonably efficient retail stores and distributors of fluid milk and fluid cream, or both, in such marketing area as the director finds is necessary to insure to consumers in such marketing area sufficient distribution facilities of the several types or methods commonly used by consumers.

(3) That such prices will protect the interests of consumers of fluid milk, fluid cream, or both, in such marketing area by insuring to them adequate and efficient distribution facilities of the several types or methods commonly used by them without requiring such consumers to pay more for their supplies of such fluid milk, fluid cream, or both, than is necessary to maintain such adequate and efficient distribution facilities in such marketing area.

(Added by Ch. 413, Stats. 1937; amended by Ch. 941, Stats. 1939.)

No sale below established price

736.13. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article, and the use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or consumer or any retail store, restaurant, confectionery or other place for consumption on the premises, buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, whether by discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift, or otherwise and whether any such discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift applies directly to fluid milk or fluid cream or is allowed upon or in connection with the sale or handling of any other commodity or product, is hereby prohibited. Every distributor in any marketing area wherein an order establishing minimum wholesale and minimum retail prices is in effect shall file with the director schedules and any amendments thereto setting forth the prices at which each such distributor is selling or offering or agreeing to sell fluid milk, fluid cream and dairy products, excluding butter, cheese, cottage cheese, canned milk, powdered milk, casein and ice cream, in such marketing area. Such filings shall be made in such office of the director as he

(Filing of price schedules)

shall designate. Such prices shall not become effective until the fifth day after filing. Evidence of any sale of, or offer or agreement to sell such fluid milk, fluid cream or dairy products by a distributor, made as part of, or in connection with the sale of, or offer or agreement to sell fluid milk and fluid cream, or both, in a marketing area where prices for fluid milk or fluid cream, or both have been established by the director, at less than the prices theretofore filed with the director by such distributor pursuant to the provisions of this section, shall constitute prima facie proof of a violation of this section. Offers and agreements to sell, as used herein shall include offers and agreements which are conditional, or which shall become effective, upon the filing thereafter of amended prices by the distributor making such offer. Upon receipt of such amendments the director shall forthwith date, file, and index the same in such manner that the information therein contained shall at all times be kept current and be readily available to any interested party desiring to inspect the same. Any other distributor in the marketing area may meet any such prices so filed; provided, that such distributor shall file with the director a schedule of prices not exceeding the prices so met by him within 24 hours after meeting the same.

(Added by Ch. 413, Stats. 1937; amended by Ch. 1214, Stats. 1941.)

Fee paid by distributors

736.14. Distributors who are subject to the provisions of this article shall pay to the director on all milk fat contained in fluid milk and fluid cream purchased from producers, including their own production, if any, a fee in mills per pound of milk fat equal to that required to be deducted from the payments due producers of fluid milk under Section 737.6 of this code. The amount so received by the director shall be used in the administration and enforcement of this chapter or any stabilization or marketing plan established by this chapter. Any amounts in excess of that required for this purpose shall be returned pro rata, at such times as the director may determine, to distributors from whom such sums were collected.

(Assessments)

(Added by Ch. 413, Stats. 1937; amended by Ch. 1214, Stats. 1941.)

Local control board distributors

736.15. The director may appoint local control boards for the marketing areas established pursuant to this chapter to assist and advise him in matters pertaining to the marketing, distribution and sale of fluid milk or fluid cream or both. The board shall consist of seven members, who shall be residents of or engaged in business within the marketing area for which they are appointed by the director, three of whom shall be persons whose major interest is the distribution, marketing or sale of fluid milk or fluid cream or both, one producer-distributor, two retail storekeepers and one person, representative of the consuming public, who has no connection with the milk or cream business. The terms of office of each member shall be two years, unless the plan is terminated before said

term expires. Said local board shall meet in regular session each month, and each member shall be allowed five dollars ($5) per diem and mileage at the rate of five cents ($0.05) per mile for attending such regular meetings. Said board with the previous approval of the director may employ such personnel as may be necessary in the performance of its duties and shall adopt rules and regulations for its conduct. The board shall submit a budget of its expenses to the director for his approval. The funds to be used for the maintenance of the board shall be paid from the proceeds of fees and licenses paid to the director under the plan upon verified claims presented by the board to the director. The board shall not incur any expenses other than those for per diem and mileage, unless approved by the director.

(Added by Ch. 413, Stats. 1937.)

(Heading Article 3, [Control of Fluid Cream] and Secs. 737, 737.1, 737.2, 737.3 and 737.4 [added by Ch. 241, Stats. 1935], all repealed by Ch. 3, Stats. 1937.)

Article 3. Licenses

(By amendment, Article 4 [Licenses], added by Ch. 241, Stats. 1935, became Article 3, Licenses, by Ch. 3, Stats. 1937.)

Distributor's license

737.5. (a) After thirty (30) days after the effective date of this chapter no distributor shall deal in fluid milk or fluid cream without first having obtained a license from the director. The special licenses provided in this section are in addition to any and all licenses required by any other section of Division 4, Agricultural Code, or any law or ordinance of any county or municipality of this State. Applications for the licenses herein provided shall be made on forms prescribed by the director and shall state the name and address of the applicant and such details as to the nature of the applicant's business as the director may require. Such applicant shall further satisfy the director of his or its character, responsibility and good faith in seeking to carry on the business stated in the application. Licenses shall be issued for a period of twelve (12) months from the first day of each year or for the remainder of the calendar year from the date of issuance. Application for a new license for the following year by a licensee shall be made at least thirty (30) days prior to the commencement of such year, and if not so made the applicant shall pay an additional sum equal to 50 per cent of the license fee before such license shall be issued.

(Renewal penalty)

Distributor's bond

(b) Every distributor before purchasing any fluid milk or fluid cream from a producer must execute and deliver to the director a surety bond in the minimum sum of one thousand dollars ($1,000), executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety. Said bond shall be upon a form approved by the director, and shall be conditioned upon the payment in the manner required by this chapter, of all amounts due to producers for fluid milk and fluid cream

purchased by such licensee or applicant during the license year. Said bond shall be to the State in favor of every producer of fluid milk and fluid cream. In case of failure by a distributor to pay any producer or producers for fluid milk or fluid cream in the manner required by this chapter, the director shall proceed forthwith to ascertain the names and addresses of all producer-creditors of such distributor, together with the amounts due and owing to them and each of them by such distributor, and shall request all such producer-creditors to file a verified statement of their respective claims with the director. Thereupon the director shall bring an action on the bond on behalf of said producer-creditors. Upon any action being commenced upon said bond, the director may require the filing of a new bond and immediately upon a recovery in any action upon such bond, such distributor shall file a new bond, and upon failure to file same within ten (10) days in either case, such failure shall constitute grounds for the revocation or suspension of the license of such distributor. In the event that recovery upon the bond is not sufficient to pay all of the claims as finally determined and adjudged by the court, any such amount recovered shall be divided pro rata among said producer-creditors.

Amount of bond

The minimum bond of one thousand dollars ($1,000) shall be required of distributors purchasing an average daily quantity of fluid milk of less than 100 gallons; distributors purchasing an average daily quantity of 100 gallons and less than 200 gallons must post a bond in the amount of two thousand dollars ($2,000); distributors purchasing an average daily quantity of 200 gallons and less than 300 gallons must post a bond in the amount of three thousand dollars ($3,000); distributors purchasing an average daily quantity of 300 gallons or more shall post a bond in the sum of five thousand dollars ($5,000).

The same bond requirements shall apply to purchases of fluid cream, except that for the purposes of computation of the required bond, 10 gallons of fluid cream shall be deemed the equivalent of 100 gallons of fluid milk.

In the event that any distributor so increases his purchases of fluid milk or fluid cream during the license year that said purchases exceed the amount for which said distributor is bonded, said distributor shall forthwith post such additional bond or bonds as may be required to comply with the provisions of this section.

The licenses and bonds provided for in this section shall be required for each distributor, and for the purposes of this section each subsidiary milk plant or branch milk plant whether under one ownership or not shall be considered as an individual distributor.

Failure of any distributor who purchases fluid milk or fluid cream from producers to execute and deliver the bond as herein provided and required shall constitute a violation of

this chapter; failure of any such distributor to post such additional bond or bonds as may be required to comply with the provisions of this chapter shall likewise constitute a violation of this chapter.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

Distributor's license fee

737.6. The fees for all licenses shall be as follows, based on the volume of fluid milk and fluid cream handled for the previous year, provided that any distributor who has not previously engaged in such business during such prior year shall pay such minimum license fee as provided by this chapter.

(a) Distributors purchasing or handling an average daily quantity of fluid milk of less than 50 gallons shall pay a license fee of three dollars ($3); distributors purchasing or handling an average daily quantity of 50 gallons and less than 100 gallons shall pay a license fee of five dollars ($5); distributors purchasing or handling an average daily quantity of 100 gallons, and less than 200 gallons, shall pay a license fee of ten dollars ($10); distributors purchasing or handling an average daily quantity of 200 gallons, and less than 300 gallons, shall pay a license fee of fifteen dollars ($15); distributors purchasing or handling an average daily quantity of 300 gallons, and less than 500 gallons, shall pay a license fee of twenty-five dollars ($25); distributors handling an average daily quantity of 500 gallons or more shall pay a license fee of fifty dollars ($50).

Deduction from producers

(b) Distributors who are subject to the provisions of any stabilization and marketing plan made effective by this chapter, shall deduct from payments due producers for fluid milk, fluid cream or both, including each distributor's own production, the sum of two mills per pound milk fat on all milk fat contained in fluid milk, fluid cream or both, or in the case of distributors who do not purchase or receive fluid milk, fluid cream or both, in milk fat pounds, the sum of seven mills for each 10 gallons of fluid milk sold. The amount so deducted shall be paid to the director on or before the fifteenth of the month following the month during which such fluid milk or fluid cream was received. The amounts so received by the director shall be used in the administration and enforcement of this chapter, or any stabilization and marketing plan established by this chapter. Any amounts in excess of that required for this purpose shall be returned at such time as the director may determine to producers pro rata from whom such sums were collected.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Bond exemption

737.6-1. No bond shall be required of any distributor who purchases fluid milk or fluid cream from a producer-distributor; provided, that the buyer at the time of obtaining possession or control of each delivery pays for the same in full in lawful money of the United States; and provided, that said fluid milk or fluid cream is purchased in package form ready

for human consumption, and not in bulk form. Any distributor before purchasing fluid milk or fluid cream on the above terms shall notify the director of his intention to make such purchases, stating from whom, and the average daily quantity of such purchases. Such distributor shall also keep a record of such purchases, showing dates of purchases, amounts of purchases, and the name or names of seller or sellers, and shall make such other and further reports to the director as he may from time to time require.

(Added by Ch. 716, Stats. 1941.)

Penalties

737.7. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any of the unfair practices set forth in this chapter, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

(b) Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the producer; failure to make such payment is hereby declared to be a violation of this chapter, and ground for refusal, suspension or revocation of license in the manner set forth in this chapter.

(c) Any person who violates any provision of a stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream shall be liable civilly in the sum of five hundred dollars ($500) for each and every violation, such sum to be recovered by the director in any court of competent jurisdiction. All sums recovered under this section shall be deposited in the State Treasury to the credit of the Department of Agriculture Fund.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 1214, Stats. 1941.)

Reports

737.8. All such distributors shall make and file with the director at least once each month such reports as the director may require to enable him to enforce the provisions of this chapter.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

737.9. Any record or report made to the director pursuant to the provisions of this article shall be confidential and shall not be divulged except when necessary for the proper determination of any court proceedings or hearing before the director.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

737.10. The director shall, within 30 days prior to each regular session of the Legislature, submit to the Governor a full and true report of the transactions under this chapter during the preceding biennium, including a complete statement of receipts and expenditures during such period.

(Added by Ch. 243, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Refusal or revocation of license

737.11. (a) The director may refuse to grant any license herein provided and may, after due hearing upon a verified complaint signed and filed with the director by any interested person, revoke or suspend any such license as the case may require, when he is satisfied that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter. Upon the filing of such verified complaint, the director shall cause a copy thereof, together with a notice of the time and place of hearing of such complaint, to be served personally or by mail upon the person or persons named as respondent or respondents therein. Such service shall be made at least ten (10) days before said hearing, which shall be held in the city or town in which is situated the principal place of business of the licensee or respondent, or in which the transaction or violation complained of is said to have occurred, or in the county seat of the county in which the transaction or violation complained of is said to have occurred, or in the nearest office of the State Department of Agriculture, at the discretion of the director. At the time and place appointed for such hearing the director or his agents shall hear the parties to said complaint, and shall enter in the office of the director at Sacramento a decision either dismissing such complaint or specifying the facts established on such hearing. A copy of such decision shall be furnished to each, every and all of the respective parties thereto.

Hearing of verified complaint

(b) Such decision may include an order refusing, revoking or suspending the license applied for or held by the respondent, or affixing such other conditional and probationary orders as may be proper for the enforcement of this chapter or any of the provisions thereof or of any stabilization and marketing plan formulated hereunder.

(c) At the time of the filing of the verified complaint herein provided, or after any decision as above described, the director may thereupon and in the premises issue to and serve upon said person or respondent, an order directing said person or respondent to show cause why the license of said person or respondent should not be suspended or revoked for the violation complained of in the verified complaint or specified in the decision.

(d) Where the order to show cause is heard separately from the case or hearing set forth in the verified complaint,

a copy of the said order to show cause, together with notice of the time and place of hearing upon said order, shall be served personally or by mail upon said person or respondent. Said order shall refer to an attached copy of a verified complaint, or to such other notice, affidavit or official document, in such a way as generally to advise and inform the respondent of the charge or violation upon which said order is based and pursuant to which it is issued. Such service shall be made at least ten (10) days before said hearing, which shall be held in the city or town in which is situated the principal place of business of the respondent, or in which the transaction or violation complained of is said or charged to have occurred, or in the county seat of the county in which the transaction or violation complained of is said or charged to have occurred, or at the nearest office of the State Department of Agriculture, at the discretion of the director.

(c) At the time and place appointed for such hearing the director or his agents shall hear the matter set forth in the order, and the showing of the licensee in the premises, and shall enter in the office of the director at Sacramento an order and decision specifying the facts, dismissing the order to show cause or directing the suspension or revocation of the license or licenses held by the licensee, or making such other conditional or probationary orders as may be proper, upon the evidence presented at such hearing. A copy of said order and decision shall be furnished to the licensee. Previous violation by any applicant or by any person connected with said applicant of any provision of this chapter or of any stabilization and marketing plan formulated thereunder or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk and fluid cream shall be good and sufficient ground for denial, revocation or suspension of a license.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

737.12. The provisions of Article 3 with respect to licenses shall not apply to retail stores as said stores are defined in this act. Retail stores exempt from license

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Article 4. Construction and Interpretation

(Heading added by Ch. 413, Stats. 1937.)

738. The Legislature hereby declares that by making any additions to, or amendments of, Chapter 10 of Division 4 of this code in the Fifty-second Regular Session of the California Legislature, it intends to formulate a comprehensive scheme for the regulation of marketing and distribution of fluid milk and fluid cream. If, however, any provision of, or amendment or addition to, said Chapter 10 of Division 4 of this code, either as originally enacted or as amended or added to

Separability

at said session, should be held to be unconstitutional, the unconstitutionality of such provision shall not affect any other provision of said chapter.

If any article, section, subsection, sentence, clause or phrase of any provision of Chapter 10 of Division 4 of this code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted each article, section, subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional.

(Added by Ch. 413, Stats. 1937.)

FOOTNOTE.—Sec. 10, Ch. 1214, Stats. 1941 (separability clause), applies only to Sections 735.3, 735.4, 736.3, 736.13, 736.14, 737.5, 737.7, and 737.11, and reads as follows:

SEC. 10. If any article, section, subsection, sentence, clause or phrase of any provision of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said act. The Legislature hereby declares that it would have enacted each article, section, subsection, sentence, clause or phrase of said act irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional.

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APPENDIX "B"

CHAPTER 65

Statutes of 1941

Senate Joint Resolution No. 17—Relative to memoralizing Congress to enact legislation requiring Federal Governmental agencies to comply with California minimum price laws for milk. (Filed with Secretary of State April 28, 1941.)

WHEREAS, Prior to 1935 unfair, unjust, destructive, and demoralizing trade practices had been carried on in the production and distribution of fluid milk and fluid cream, which practices constituted a constant menace to the health and welfare of the inhabitants of the State of California, and tended to undermine sanitary regulations and standards of content and purity of fluid milk and fluid cream; and

WHEREAS, In the opinion of the Legislature of the State of California, health regulations were insufficient to prevent disturbances in the milk industry, which disturbances threatened to destroy and seriously to impair the future supply of fluid milk; and

WHEREAS, To safeguard the consuming public from future inadequacy of supply of this necessary commodity, the Legislature of the State of California in 1935 declared that it was the policy of the State of California to promote, foster, and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper

marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers of such milk; and

WHEREAS, As a result of such declaration of policy, the Legislature of the State of California declared that the production, transportation, processing, storage, distribution, and sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare, and thereupon enacted a law providing for the stabilization of marketing of fluid milk and fluid cream, which law is Chapter 10 of Division 4 of the Agricultural Code of the State of California, and bestowed upon the Director of Agriculture of the State of California the administrative authority, after investigation and public hearing, to prescribe marketing areas wherein different prices and regulations should be defined; and

WHEREAS, Under said law the Director of Agriculture of the State of California has established stabilization and marketing plans in 16 marketing areas within said State of California, providing minimum prices to be paid to producers of fluid milk, and in connection with said plans has established in 13 marketing areas within said State of California, schedules of minimum wholesale and minimum retail prices for fluid milk; and

WHEREAS, Approximately 85 per cent of the fluid milk produced and distributed in the State of California is marketed under said market controls, said 85 per cent being approximately equivalent to 73,000,000 pounds of milk fat

yearly, to an approximate value of forty-two million dollars ($42,000,000) to California producers of fluid milk; and

WHEREAS, Since the adoption of the California State Milk Control Law, the dairy industry, with the aid of the State, has corrected certain evils and has developed and maintained satisfactory marketing conditions and has brought about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream; and

WHEREAS, The expansion and extension of the National Defense Program has resulted in the great and continuing increase in the number and personnel of defense units quartered in the State of California and in milk marketing areas thereof, and a great and continuing increase, in said areas, of the consumption of fluid milk, whereby a large and increasing percentage of the fluid milk marketed in California is sold to and consumed by said defense units; and

WHEREAS, Quartermasters, Purchasing Officers and other Supply Officers of the Army, Navy, Marine Corps, CCC, Air Corps, Flying Schools, and of other military and naval units of the United States are directed or required by Federal law, rule, order or regulation to make purchases of food supplies, including fluid milk, at competitive bid prices, regardless of minimum price regulations and schedules established by the Director of Agriculture of the State of California; and

WHEREAS, The Attorney General of the State of California has advised the Director of Agriculture of the State of California that said director is without power or jurisdiction to apply or enforce minimum producer price schedules or minimum resale price schedules as to fluid milk sold or delivered to agencies or units of the United States Government quartered on property or premises ceded to or owned by the United States Government; and

WHEREAS, Distributors of fluid milk in competing for the fluid milk business of said defense units so situated make bids and offers of sales and actual sales of fluid milk for delivery to said units at prices below the minimum prices established by the Director of Agriculture, and in turn pay and return to the producers supplying such fluid milk prices below the minimum prices established and ordered by said director to be paid to said producers, resulting in severe operating losses which can not at this time be approximated, but which may be estimated at many thousands of dollars per day to aggregate California producers supplying such milk for such purposes; and

WHEREAS, From the foregoing there have resulted enormous and continuing losses to California producers of fluid milk, unutterable confusion and chaotic marketing conditions, and breakdown of the law and of minimum producer price and minimum resale schedules established thereunder; and

WHEREAS, If said situation is permitted to continue, California producers of fluid milk face loss of income, possible bankruptcy, and financial disaster; and

WHEREAS, California producers of fluid milk are in the premises forced to shoulder an unfair and disproportionate part of the cost, duty and burden imposed by the National Defense Program on all citizens, thus resulting in disorganization and unstabilization of the fluid milk business of the State of California, resulting in turn in great and inestimable losses to producers and distributors of fluid milk; and

WHEREAS, It is vital to the dairy industry of the State of California, which, as aforesaid, is an industry affecting the public health and welfare of the people of the State of California, that not less than the minimum prices fixed by the Director of Agriculture of the State of California be charged in such areas; now, therefore, be it

Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of this State hereby memorializes and recommends to the Congress of the United States that it pass and enact, forthwith and as an emergency measure, such laws, statutes, rules or regulations, as will direct and require purchasing officers of the Army, Navy, Marine Corps, Air Corps, or such others as may be in authority over the purchasing of food supplies for the above and other defense units or other agencies of the United States quartered in the State of California, and in milk marketing areas in said State, to regard as unlawful and to refuse to entertain or consider or accept bids or offers from any distributor or producer of fluid milk, which bids or offers are below the minimum prices established by the Director of Agriculture pursuant

to the provisions of California's Milk Stabilization Law or amendments thereof, and that said Congress declare, by joint congressional statute, or otherwise, that where the minimum price of fluid milk and fluid cream is fixed by competent State legal authority, said purchases by the Federal Government within the geographical areas of the State of California, and upon territory ceded by such State to the Federal Government, shall be at prices not less than the minimum prices declared by such competent State legal authority.

APPENDIX "C".

Santa Clara County Order Number Two (2) of the Director of Agriculture Declaring in Effect Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, Together With Rules and Regulations Pertaining Thereto, for the Santa Clara County Marketing Area, as Modified.

WHEREAS, the Director of Agriculture of the State of California, acting pursuant to and by virtue of the authority vested in him by the provisions of Chapter 10, Division IV of the Agricultural Code of the State of California, as Amended, issued General Order Number Thirty-four (34) prescribing the Santa Clara County Marketing Area, which Order became effective November 20, 1937, and subsequent thereto issued General Order Number Ninety-eight (98) modifying the said Santa Clara County Marketing Area, which Order became effective October 16, 1940, and

WHEREAS, the Director of Agriculture, acting pursuant to and by virtue of the authority vested in him by the provisions of Chapter 10, Division IV of the Agricultural Code of the State of California, as Amended, issued General Order Number Ninety-nine (99) declaring in effect a Stabilization and Marketing Plan for Fluid Milk, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, which Plan became effective October 16, 1940, and

WHEREAS, said Stabilization and Marketing Plan for Fluid Milk for said Area was amended by General Order Number One Hundred and Thirty-three (133), and Santa Clara County Order Number One (1) issued by the Di-

rector of Agriculture, effective March 1, 1941 and October 24, 1941, respectively, and

WHEREAS, the Director of Agriculture, acting pursuant to and by virtue of the authority vested in him by the provisions of Chapter 10, Division IV of the Agricultural Code, as Amended, issued General Order Number One Hundred (100), declaring in effect Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, which Schedules and Rules and Regulations became effective October 16, 1940, and

WHEREAS, said Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk for said Area were amended by General Order Number One Hundred and Thirty-four (134), issued by the Director of Agriculture effective March 1, 1941, and

WHEREAS, the Director of Agriculture finds that said Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, made effective by General Order Number One Hundred and Thirty-four (134), as aforesaid, do not now conform fully to the standards prescribed in nor tend to effectuate fully the purposes of said Statute, and

WHEREAS, the Director of Agriculture has heretofore made investigations, examined books and records of distributors and retail stores engaged in the distribution of fluid milk in said Area, formulated and proposed Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regu-

lations pertaining thereto, for said Marketing Area, and has held a public hearing thereupon in said Area, as required by Section 736.12 of said Code, which hearing was held in the Civic Auditorium, San Jose, California, on September 25, 1941, and due notice thereof was given by the Director of Agriculture to each distributor and retail store in said Marketing Area whose name appears upon the records of the Department of Agriculture for the Santa Clara County Marketing Area, as Modified, or who filed a request for the same with the Department as prescribed in said Section of said Code, and

WHEREAS, at said public hearing, the Director of Agriculture, acting through the person of his duly authorized agent, L. J. Weishaar, Assistant Chief, Bureau of Market Enforcement, Department of Agriculture, State of California, presented for consideration said proposed Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, introduced all exhibits and evidence upon which such prices were proposed and received all testimony and evidence, both oral and documentary, including amendments offered by persons present at said public hearing, relating to said proposed Schedules, as Amended, and Rules and Regulations, and all persons were given an opportunity to be heard and to examine all such testimony and evidence, and a full and complete record was kept of such testimony and proceedings, to which record, on file in the office of the Director of Agriculture, reference is hereby made, and

WHEREAS, the Director of Agriculture, acting through the person of his duly authorized agent, W. J. Kuhrt,

Chief, Bureau of Markets, Department of Agriculture, State of California, after consideration of the amendments, testimony and evidence presented at said public hearing, finds that the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, attached hereto, conform to the standards prescribed in Section 736.12 of the said Code, in that:

(a) Such prices are not more than reasonably sufficient to cover all necessary costs according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores engaged in the distribution of fluid milk in said Marketing Area, as such necessary costs of reasonable efficient distributors and retail stores are shown by the facts disclosed, made available and discovered from the investigations and surveys made and hearings held, as required by said Section 736.12 of said Code;

(b) Such prices will tend to maintain in the business of distributing fluid milk such number of reasonably efficient retail stores and distributors of fluid milk in said Marketing Area as the Director finds is necessary to insure to consumers in said Marketing Area sufficient distribution facilities of the several types or methods commonly used by consumers;

(c) Such prices will protect the interests of consumers of fluid milk in said Marketing Area by insuring to them

adequate and efficient distribution facilities of the several types or methods commonly used by them without requiring such consumers to pay more for their supplies of such fluid milk than is necessary to maintain such adequate and efficient distribution facilities in said Marketing Area;

(d) The Rules and Regulations of the Director of Agriculture pertaining to the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, attached hereto, are necessary to effectuate the purposes of Chapter 10, Division IV of the Agricultural Code, as Amended, and to enable the Director of Agriculture to administer and enforce the said Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, within the standards as prescribed by Chapter 10, Division IV of said Code, and

WHEREAS, in determining the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, attached hereto, the Director of Agriculture, acting through the person of his duly authorized agent, W. J. Kuhrt, as aforesaid, has taken into consideration the following economic factors operative in said Area:

(a) The quantities of fluid milk distributed in said Marketing Area;

(b) The quantities of fluid milk normally required by consumers in said Marketing Area;

(c) The cost of fluid milk to distributors and retail stores in said Marketing Area, which in all cases is the price paid by distributors, as established in the Stabilization and Marketing Plan for Fluid Milk, as Amended, to become effective in said Marketing Area, October 24, 1941, pursuant to the provisions of Santa Clara County Order Number One (1), and the minimum wholesale prices set forth in the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, attached hereto;

(d) The reasonable cost of handling fluid milk incurred by distributors and retail stores, respectively, including all costs of hauling, processing, selling and delivering, by the several methods used in such Marketing Area in accomplishing such hauling, processing, selling and delivery, as such costs have been determined by impartial surveys and audits of the books and records of such portion of the distributors and retail stores, respectively, of each type or class in said Marketing Area, as have been found by the Director to be representative to indicate the costs of all distributors and retail stores, respectively, in said Marketing Area, and in determining the cost of handling and distributing fluid milk by retail stores handling commodities in addition to fluid milk, the Director has considered all costs and expenses of doing business, including depreciation on inventory and equipment;

(e) The reasonable cost of handling fluid milk incurred by distributors in hauling, processing, selling and deliver-

ing to restaurants, confectioneries, or other places for consumption on the premises wherein it is required by law that service to customers be made from the original container. In fixing the minimum wholesale prices to be paid distributors by such persons, the Director has taken into consideration such legal requirements and other factors and distribution costs peculiarly affecting service to such persons, and has established the prices in accordance with the said requirements;

(f) The amount of available capacity for processing and distributing fluid milk of all distributors and retail stores in said Marketing Area and the extent to which such available capacity is being used by said distributors and retail stores;

(g) The purchasing power of consumers in said Marketing Area.

Now, therefore, it is ordered by the Director of Agriculture, acting through the person of his duly authorized agent, W. J. Kuhrt, as aforesaid, pursuant to and by virtue of the authority vested in him by the said Chapter 10, Division IV of the Agricultural Code, as Amended, that:

(a) The attached Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, and

(b) The attached Rules and Regulations of the Director of Agriculture pertaining to said Schedules, prescribed herein and which follow hereinafter, shall be and the same are hereby declared to be in effect on and after 12:01 A. M., Pacific Standard Time, October 24, 1941, and shall thereupon and thereafter remain in effect as provided in the said Chapter 10, Division IV of the said Code.

In Witness Whereof, this Santa Clara County Order Number Two (2) of the Director of Agriculture, declaring in effect Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, is hereby executed and issued in the City of Secramento, California, this 17th day of October, 1941.

W. J. CECIL
Director of Agriculture

By (Signed) W. J. KUHRT
W. J. KUHRT, Chief
Bureau of Markets

(Sealed with the Seal of the State Department of Agriculture)

Section 4. Special Provisions Relating to Fluid Milk Sold to Agencies of the Federal, State or Local Government. The following maximum reductions may be made below the prices contained in Part A of Schedules 1 to 9, inclusive, where the sale and delivery of fluid milk during any calendar month to designated delivery locations of agencies of the Federal, State or Local Government

amounts to the monthly total sales value as set forth in the classifications specified below;

When the monthly total sales value of fluid milk delivered during the calendar month is—	The following maximum percentage reductions below the minimum wholesale prices may be made:
$5,001 and over	12½%
3,001—5,000	10%
1,001—3,000	7½%
250—1,000	5%
100— 249	3%

Credit for any such reduction earned shall not be granted prior to the first (1st) day of the month following the month in which the reduction is applicable.

For the purpose of establishing a basis for fluid milk sales in accordance with this Section, a location shall be deemed to include any number of buildings located upon one piece of property and shall include military and naval reservations and hospitals or other establishments under the exclusive jurisdiction of the Federal, State or Local Government.

Schedule 7. When the price paid by distributors to producers for Class 1 fluid milk as established in the Stabilization and Marketing Plan for Fluid Milk for the Santa Clara County Marketing Area, is seventy-eight cents ($0.78) per pound milk fat contained in fluid milk, the minimum wholesale and minimum retail prices for fluid milk in the container sizes specified shall be as follows:

Schedule 7—Part A

Minimum Wholesale Prices for Fluid Milk

Quantity	Wholesale prices f.o.b. purchaser's business location		
	4.0% milk fat	4.5% milk fat	5.0% milk fat
10 gallons or more, bulk, per gallon	$0.36	$0.395	$0.43
5 gallons and less than 10 gallons, bulk, per gallon	.365	.40	.435
1 gallon and less than 5 gallons, bulk, per gallon	.37	.405	.44
Gallon bottle	.42	.44	.48
Half-gallon container	.21	.22	.24
Quart container	.1075	.115	.125
Pint container	.0625	.065	.07
Third-quart or three-quarter-pint container	.048	.050	.053
Half-pint container	.040	.042	.044

Schedule 7—Part B

Minimum Retail Prices for Fluid Milk

Quantity	Retail store carry-out prices			Retail home delivered prices		
	4.0% milk fat	4.5% milk fat	5.0% milk fat	4.0% milk fat	4.5% milk fat	5.0% milk fat
Gallon bottle	$0.47	$4.49	$0.53	$0.49	$0.51	$0.55
Half-gallon container	.24	.25	.27	.25	.26	.28
Quart container	.125	.13	.14	.13	.135	.145
Pint container	.075	.075	.08	.08	.08	.085

APPENDIX "D".

Report by the Bureau of Markets Regarding the Method Used to Determine the Cost of Distributing Fluid Milk to Agencies of the Federal Government for the Santa Clara County Marketing Area.

The Department's proposed price for fluid milk and for the discount schedule for sales of fluid milk to agencies of the Federal Government was based upon a study of milk plant operations in the Santa Clara County Marketing Area covering operations for the period January 1941 to July 31, 1941. This current survey brought up to this date a determination of increases in costs according to size of containers which had occurred since 1939, the year of a comprehensive survey and 166 page report on the cost of producing and of distributing fluid milk in this marketing area.

On the basis of these data, computations were made to determine the amount of savings on sales of fluid milk to agencies of the Government in that marketing area as compared with plant operations for sales in regular channels. The operating expense for the seven months of the year 1941 indicated a general increase of 10.98% over the cost of operations for the year 1939. Adjustments were made in proposing the resale price schedules which were made effective October 24, 1941.

The attached table shows a comparison of the cost of distribution of fluid milk in half-pint containers to the regular wholesale trade as compared with the cost of distributing half pints to agencies of the Federal Government. Raw product cost for distribution to the regular wholesale trade was based upon 4% milk-fat content at

78 cents per pound as compared with 3.5% milk, delivered to agencies of the Federal Government.

Processing and general and administrative costs per container are identical in each instance.

Delivery costs to the regular wholesale trade were based upon the delivery of 1000 labor units per day or the equivalent of 2000 half pints daily. In computing the delivery costs for fluid milk delivered to agencies of the Federal Government, the standard for delivery is 4000 half pints per day. Normal expense items which were eliminated in arriving at the cost of distributing milk to agencies of the Government were the cost of collectors, bad debt expense, selling expense, and advertising expense.

The result of these computations, based upon the delivery of 4000 half pints as compared with 2000 half pints and after making the above eliminations, represents a saving of .1462 of a cent per half pint below distributing expense to other wholesale customers. The difference in the raw product cost, comparing 4% milk with 3.5% milk at 78 cents, is .2096 of a cent. The total of raw product cost for government sales plus operating expenses for this type of distribution is 3.3802 cents per half pint, excluding return on distributor's investment compared with a total cost of distributing half pints to ordinary customers of 3.7360 cents per half pint. The minimum wholesale price established by the State for half pints of milk for the month of November was 4 cents. The discount allowed to the Federal Government on a monthly $3000 to $5000 volume, which is based on the 4000 half pint labor unit is 10% off the established minimum wholesale price of .04 cents per half pint.

SANTA CLARA COUNTY MARKETING AREA COMPARISON OF COSTS OF DISTRIBUTING FLUID MILK IN HALF-PINT CONTAINERS TO FEDERAL AGENCIES AS COMPARED TO REGULAR WHOLESALE DISTRIBUTION.

	Per half pint to Federal agencies ¢	Per half pint regular wholesale ¢	Difference ¢
Raw product cost	1.4674	1.6770	.2096
Processing	.5122	.5122	
General and administrative	.3437	.3437	
Delivery	1.0569	1.2031	.1462
Available return on investment (inc. prov. for fed. taxes)	.2198	.2640	.0442
Total, including return	3.6000	4.0000	.4000
Price effective	*3.6000	4.0000	.4000

*10% discount

BUREAU OF MARKETS,
CALIFORNIA DEPT. OF AGRICULTURE,
By E. L VEHLOW,
Fluid Market Milk Assistant.

APPENDIX "E."

Memorandum of Federal Acts Applicable to Interstate Commerce.

7 U. S. C., chapter 1, "Commodity Exchange Act." This act prohibits dealings in contracts for future deliveries of certain agricultural products.

7 U. S. C., chapter 3, "Grain Standards Act." This act authorizes the Secretary of Agriculture to investigate the handling, grading, and transportation of grain and corn, and to alter or modify standards of quality and condition whenever the necessities or the trade may require. When the standards are fixed by the Secretary no grain may move in interstate commerce unless inspected and graded by a licensed inspector.

7 U. S. C., section 116, provides that misbranded seeds transported in interstate commerce are subject to confiscation.

7 U. S. C., section 126, provides that adulterated and misbranded insecticides are prohibited from interstate commerce.

7 U. S. C., section 141, provides that transportation of insect pests in interstate commerce is prohibited.

7 U. S. C., section 158, requires certain markings on packages and inspection of packages of nursery stock for interstate shipment.

7 U. S. C., section 414, provides that upon request the Secretary of Agriculture may certify the records of farm products offered for interstate shipment.

7 U. S. C., section 492, provides that the Secretary of Agriculture "shall by regulation provide for the making

of prompt investigations and the issuing of certificates as to the quality and condition of produce received in interstate commerce or in the District of Columbia."

7 U. S. C., chapter 20. This is an act prohibiting destruction or dumping of farm products received in interstate commerce.

7 U. S. C., chapter 26A, "Agricultural Marketing Agreement Act of 1937," providing for arbitration of disputes concerning milk.

7 U. S. C., chapter 37, "Federal Seed Act." This act prohibits the movement in interstate commerce of seeds unless each container bears a label giving certain information about seeds, such as the name and kind of seed, origin, percentage of noxious weed seeds, etc.

* * * * *

15 U. S. C., chapter 1, "Sherman Anti-Trust Act."

15 U. S. C., chapter 2A, "Securities Act of 1933."

15 U. S. C., chapter 2B, "Securities Exchange Act of 1934."

15 U. S. C., chapter 2C, "Public Utility Holding Company Act of 1935."

15 U. S. C., chapter 2D, "Investment Company Act of 1940" and "Investment Advisers Act of 1940."

15 U. S. C., sections 231 to 241, provide standards for barrels used in interstate commerce.

15 U. S. C., sections 251-253, provide standard sizes of baskets and containers used in interstate commerce.

15 U. S. C., section 294, prohibits the transportation of misbranded silverware in interstate commerce.

15 U. S. C., section 404, provides for the confiscation of misbranded parcels containing caustic or corrosive substances which have been moved in interstate commerce.

15 U. S. C., chapter 15A, prohibits the interstate shipment of contraband oil.

15 U. S. C., chapter 18, prohibits the transportation in interstate commerce of firearms and ammunition except under license.

* * * * *

16 U. S. C., sections 824, *et seq.*, provide for the regulation of electric utility companies engaged in interstate commerce.

16 U. S. C., chapter 13, provides for the regulation of interstate transportation of black bass.

* * * * *

18 U. S. C., section 387, forbids interstate carriage of lottery tickets.

18 U. S. C., section 390, prohibits the shipping of packages of spirituous, vinous, malt or other fermented liquor not plainly marked.

18 U. S. C., section 392, prohibits the transportation of illegally killed game in interstate or foreign commerce.

18 U. S. C., section 396, prohibits the transportation of obscene books or literature in interstate or foreign commerce.

18 U. S. C., section 396a, prohibits the transportation of convict-made goods in interstate or foreign commerce.

18 U. S. C., section 397, "Mann Act."

18 U. S. C., section 407a, prohibits the transportation of strikebreakers in interstate commerce.

18 U. S. C., section 408, "National Motor Vehicle Theft Act."

18 U. S. C., section 408a, "Transportation of Kidnaped Persons in Interstate Commerce."

18 U. S. C., section 408c, applies to receiving, possessing, or disposing of money delivered as ransom money for kidnaped person transported in interstate commerce.

18 U. S. C., section 408d, applies to threatening communications in interstate commerce.

18 U. S. C., section 408e, applies to persons moving in interstate or foreign commerce to avoid prosecution for a felony or giving testimony.

18 U. S. C., section 412a, provides punishment for wrecking trains, engines, motor units, or cars used, operated, or employed in interstate commerce by any railroad.

18 U. S. C., sections 413-419, "National Stolen Property Act."

18 U. S. C., sections 420a-420e, prohibits interference with interstate or foreign commerce by violence, threats, or the purchase or rental of property or protective service.

* * * * *

21 U. S. C., section 16, prohibits interstate commerce in falsely labeled or misbranded dairy or food products which misstate state or territory of origin.

21 U. S. C., section 20, provides "standard grades of apples when packed in barrels which shall be shipped or delivered for shipment in interstate or foreign commerce, or which shall be sold or offered for sale within the District of Columbia or the territories of the United States."

21 U. S. C., section 3, prohibits interstate commerce in filled milk.

21 U. S. C., sections 71-93, provide for the inspection of all slaughter houses, etc., the products of which are to be used in interstate or foreign commerce. Section 87 prohibits the movement in interstate commerce of meat not inspected by the Department of Agriculture.

21 U. S. C., section 96, prohibits the transportation of unmarked horse meat in interstate or foreign commerce.

21 U. S. C., chapter 9, "Federal Food, Drug, and Cosmetic Act."

* * * * *

27 U. S. C., chapter 20A, "Perishable Agricultural Commodities Act."

* * * * *

29 U. S. C., chapter 7, "National Labor Relations Act."

29 U. S. C., chapter 8, "Fair Labor Standards Act of 1938."

* * * * *

42 U. S. C., chapter 4, regulating interstate and foreign commerce in viruses, serums, toxins, antitoxins, etc.

* * * * *

47 U. S. C., Chapter V, "Communications Act of 1934," regulating interstate and foreign commerce in communication by wire and radio.

* * * * *

49 U. S. C., "Interstate Commerce Act."

* * * * *

55 Stat. 631, chapter 366, "National Cattle Theft Act."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 275

PACIFIC COAST DAIRY INC. (a corporation),
Appellant,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; WILLIAM J. CECIL, Director of Agriculture of the State of California; C. J. CAREY, Chief; E. E. BROWN, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California,
Appellees.

Appeal from the Supreme Court of the State of California.

SUPPLEMENTAL BRIEF FOR APPELLEES, WITH APPENDIX.

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Table of Contents

		Page
I.	Preliminary statement	1
II.	Summary of argument	2
III.	Argument	3
	A. The State of California has the power specially to license persons legitimately within its jurisdiction to do business as fluid milk distributors upon such terms and conditions as the State of California may lawfully impose	3
	1. The State of California lawfully imposed as a condition to the granting of the special distributor's license to the appellant distributor that it should not buy or sell fluid milk within the defined geographic boundaries of the Santa Clara County Marketing Area below the prescribed minimum prices for such fluid milk	3
	2. The milk control statute of the State of California operates on the person of the licensee distributors. It does not operate on any consumer of fluid milk, including agencies of the federal government	6
	B. The economic consequences of a reversal of the decision of the California State Supreme Court would be to upset the milk stabilization plan of the State of California	9
IV.	Conclusion	13
Appendix:		
	Affidavit of Harold G. Claudius, manager of Consolidated Milk Producers for San Francisco regarding effect on producers of sales by State distributors to federal agencies at below State minimum prices	i

Table of Authorities Cited

Cases

	Pages
Collins v. Yosemite Park and Curry Company, 304 U. S. 518	5
Rainier Nat. Park v. Martin, 18 Fed. Supp. 481	5
Schecter Poultry Corp. v. U. S., 295 U. S. 495	14

Statutes

California Agricultural Code, Chapter 10, Div. IV, 735.3(h)	3, 4
California Constitution, Article XXI, Sec. 1	5

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I. PRELIMINARY STATEMENT.

References to opinions below, the statute involved, the jurisdictional statement, and a statement of the facts of the case need not be repeated.

The purpose of this brief is to supplement the argument made in appellee's original brief, with particular reference to the effect of a reversal of the State Supreme Court's decision on the fluid milk producers of California.

II. SUMMARY OF ARGUMENT.

A. The State of California has the power specially to license persons legitimately within its jurisdiction, to do business as fluid milk distributors upon such terms and conditions as the State of California may lawfully impose.

1. The State of California lawfully imposed as a condition to the granting of a special distributor's license to the appellant distributor that it should not buy or sell fluid milk within the defined geographic boundaries of the Santa Clara County Marketing Area below the prescribed State minimum prices for such fluid milk.

2. The Milk Control statute of the State of California operates on the person of the licensee distributors, including appellant. It does not operate on any consumer of fluid milk, including agencies of the federal government.

B. The economic consequence of a reversal of the decision of the California State Supreme Court would be to upset the milk stabilization plan of the State of California.

III. ARGUMENT.

A. THE STATE OF CALIFORNIA HAS THE POWER SPECIALLY TO LICENSE PERSONS LEGITIMATELY WITHIN ITS JURISDICTION TO DO BUSINESS AS FLUID MILK DISTRIBUTORS UPON SUCH TERMS AND CONDITIONS AS THE STATE MAY LAWFULLY IMPOSE.

There is no contention that the State of California is without power to regulate the milk industry in the manner in which it is being regulated in California. The appellant distributor (R. 1) expressly alleges that it is "licensed as a distributor of fluid milk, in accordance with and by virtue of the aforesaid Chapter 10, Div. IV of the Agricultural Code".

1. The State of California lawfully imposed as a condition of the granting of a special distributor's license to the appellant distributor, that it should not buy or sell fluid milk within the defined geographic boundaries of the Santa Clara Marketing Area, below the prescribed minimum prices for such fluid milk, or violate the provisions of any stabilization and marketing plan formulated under the applicable provisions of the Agricultural Code.

Whether approached from the Hamiltonian or the Jeffersonian theory of our union, these facts, inexorable and clear, remain:

1. The Legislature of the State of California has declared that the health and the welfare of the State of California required the passage of the Milk Control law, and it made the law applicable to all areas within the State of California.

2. The law is applicable to all *persons* subject to the jurisdiction of the State of California.

There is no assertion, insofar as appellant is concerned, that the Director of Agriculture unlawfully and im-

properly included Moffett Field as a part of the Santa Clara County marketing area. For the purposes of the California milk control statute, *and the distributor licensees on whom the statute operates*, Moffett Field is within the geographical limits of the State.

It inevitably follows that the fluid milk distributors specially licensed by the State of California to operate in the Santa Clara County marketing area are obliged to sell milk everywhere in that area, *no matter who the purchaser may be*, at prices not below the minimum prices fixed by the Director of Agriculture for the Santa Clara County marketing area; and likewise that such specially licensed distributors are obliged to pay their shippers of milk the statutory price fixed by the State Director.

The penalty for their failure to obey laws found by the Legislature and the Courts as essential to the public health is the forfeiture of their licenses.

The nub of this case is the meaning of the phrase "within this State", because that phrase defines and bounds the limits of the California Act, and it is within those limits that the California State Director of Agriculture has the power to designate marketing areas for fluid milk; that phrase designates the orbit of his authority.

In Chapter 10 of Division IV of the California Agricultural Code, Section 735.3(h) it is provided that:

> "A marketing area is any area *within this State* declared to be such in the manner prescribed in this chapter."

The term "*within this State*" as used in the California Milk Control law does and must mean within the *geographical* boundaries of the State of California.

The Constitution of the State of California, in Article XXI, Section 1, defines the boundaries of the State of California, and by reference thereto it will be found that all of Santa Clara County is included within those geographical limits. Therefore, by application to the law and its definitions, it is found that the Director is given power by the California Legislature to include Moffett Field, because it is territorially within the boundaries of this State, within any marketing area he may establish.

This is not stated without authority. The United States Supreme Court, in the case of *Collins v. Yosemite Park and Curry Company*, 304 U. S. 518, at p. 535, 82 L. Ed. 1502 (1937), specifically there said:

> "The Act is restricted to sales 'in this State', but that term embraces all territory within the geographical limits of the State."

In *Rainier Nat. Park v. Martin*, 18 Fed. Supp. 481 (1937), affirmed without opinion in 302 U. S. 661, 82 L. Ed. 511 (1938), the conclusion was also reached that the term "in this State", set forth in the Washington Retail Sales Tax Act, included retail sales made in Rainier National Park, which was territory ceded to the Federal Government by the State of Washington. It was there aptly said:

> "The terms 'in this state' and 'within this state' as here used obviously mean within the geographical limits of the state. The park is within those limits, and the area comprising the park is not by such terms excluded from the other areas where the tax is obviously applicable."

The power of the State, or the Director in this case, to include physically Moffett Field within the Santa Clara County marketing area cannot be disputed.

The fact that, in the marketing order for the Santa Clara County area, Moffett Field may be within the physical limits of the area so designated and created, does not indicate abuse of power by the Director of Agriculture of the State of California. Nor does it constitute an infringement, upon the Federal Government's exclusive jurisdiction over Moffett Field.

The Court below concluded that the California Milk Control Act regulates not the federal agencies within the State of California, but the distributors who are independent contractors with the Federal Government, and this characterization of the Act we assume is a conclusive interpretation of the State law.

2. The milk control statute of the State of California operates on the person of the licensee distributors. It does not operate on any consumer of fluid milk, including agencies of the federal government.

The Milk Control Law, in so far as this case is concerned, operates *in personam*, that is against the person of the distributor over whom the state has already acquired jurisdiction and control by means of his submission to the licensing feature of the law.

The stabilization plan put into effect by the Director for the Santa Clara County marketing area, in so far as the situation here is concerned, operates upon the person of the distributor and not upon the commodity itself. In this respect it is akin to the power of a court of equity to control, through an *in personam* decree, acts or property without its territorial jurisdiction.

In the Neutrality Act, it is provided that the President of the United States has the power to fix zones through which the merchant marine of the United States may not navigate. The fact that those zones are beyond the territorial jurisdiction of the United States would not invalidate the Act itself or the administrative ruling of the executive fixing those zones.

With respect to the Neutrality Act, the President of the United States has no jurisdiction in waters foreign to our own soil, but by reason of his jurisdiction over the merchant marine he can enforce his orders setting up the neutrality zones. This is no more than what we contend to be the power of the Director of Agriculture in this case. He has *no jurisdiction over Moffett Field,* but he has full jurisdiction over the distributors, licensed by him, and through his jurisdiction over the distributors, whom he licenses, he can enforce his orders in so far as they pertain to the maintenance of minimum prices set for the Santa Clara County marketing area.

The federal agency here involved is in the same position as any other consumer. It has the same, but no greater rights than any other consumer.

It enjoys the same protection against high prices and impure milk that every other purchaser of milk within the State of California enjoys.

Should the law be broken down because of the infinitesimal burden upon the federal agency when its uniform enforcement is so vital to agriculture and health and welfare of the people of this State?

It should be borne in mind that the stabilization plan established by the Director does not operate upon the consumer at all, except for his benefit.

The stabilization plan is in effect a protection to the consumer, but the consumer is free to do as he sees fit—to buy or not to buy milk, or to buy milk at a price below that set by the Director of Agriculture. Should the consumer buy milk below the price set by the Director in any marketing area, the distributor or retailer who sells to him is guilty of a violation of the Act, but the consumer himself is guilty of no violation of the Act.

Thus, in this case the federal agency, if a distributor agrees to furnish it with milk below the statutory minima, has committed no offense except the moral offense of one sovereign violating the established policy of another sovereign.

Therefore, the Act in the instant case does not directly affect or attempt to regulate the Federal Government. It only incidentally affects the price which the Government may pay for its milk. And, therefore, the State of California in no way infringes upon the jurisdiction of the Federal Government except in the remote manner in which the exercise of the State's police power affects it.

Of course, the State of California cannot regulate an instrumentality of the United States. On the other hand, an institution of the Federal Government such as the Letterman General Hospital in San Francisco, or Moffett Field in Santa Clara County, cannot wholly escape every consequence arising from a fact so pervasive and so insistent as is the *fact* of its location in the midst of a civilized community whose orderly existence and continuance are derived from another sovereignty of general powers.

No attempt is made in the California law, or in the stabilization and marketing plan of the State Director of

Agriculture, to control or give direction to federal agencies wherever situated.

The control is over, and the direction is given to licensees of the State of California, who obtained their licenses upon their agreement, *in futuro*, to charge not less than the minimum prices determined by him.

Federal agencies are similarly affected by telephone rates, heat and light bills, and water rates. They pay common carrier rates to railroads. We are unable to see any reason why distributors should not be required, in their dealings with such agencies to obey this reasonable and proper California law.

B. THE ECONOMIC CONSEQUENCE OF A REVERSAL OF THE DECISION OF THE CALIFORNIA STATE SUPREME COURT WOULD BE TO UPSET THE MILK STABILIZATION PLAN OF THE STATE OF CALIFORNIA.

If the fluid milk distributors, specially licensed by the State of California, are to be released from their obligations to obey this State law, whenever in the course of their contacts with federal agencies located upon ceded territory, it is convenient for them to be thus released, the time will arrive when the encroachments upon the public order of the States will be very substantial.

It should be emphasized that such a release would mean not only that the distributors might charge what they pleased for fluid milk, *but also that the producer, who has no participation or say in such transactions would be paid what the distributors wanted to pay them.*[1]

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[1]See affidavit of Harold G. Claudius in the appendix to this brief, giving documentation on what the producer receives when the milk control law breaks down.

We live in an age in which the various Legislatures deal, in large part, with the economic life of the various States. They often do so, as here, by regulations and orders to their citizens. They often do so, as here, by licensing their citizens to do business upon certain terms and conditions. Sometimes the conditions are conditions precedent. An example of that would be a showing of satisfactory moral character prior to the issuance of a license. Sometimes the conditions are conditions subsequent. An example of that is this very case, in which the distributor-appellant, when it obtained its license to do business as a distributor, agreed that subsequent to the time the license was issued, it would not sell milk within the boundaries of the marketing area at below the prices fixed by the Director of Agriculture.

Why is it important that this condition should be maintained?

The producer, that is, the farmer who sells his milk to a distributor does not know at the time the sale is made what price he will eventually receive for the milk. Neither, for that matter, does the distributor know what price he can eventually pay the producer, even though he complies with the minimum prices set by the State Director.

On one day, for example, the consumers in the San Francisco marketing area may drink fifty-nine thousand gallons of milk. The next day the demand might drop to fifty-five thousand gallons. The demand for milk fluctuates from day to day, but both the producer and the distributor must be in a position to meet that demand.

How do they do it? They do it by having sufficient milk available for all purposes. Thus, although all of the milk

shipped into San Francisco is fluid milk designed for human consumption, not all of it is so used. This surplus is commonly called "stand by". The producer is paid in accordance with the use to which the milk is put. If the consumer drinks it, the farmer is supposed to be paid the full price. If he doesn't, the milk is otherwise disposed of, and the farmer gets a lower price.

The distributor supplies the needs of his customers by the delivery of milk for human consumption. This milk is known as Class I milk, and for this milk the distributor receives or should receive at least the minimum price set by the Director of Agriculture.

But the remainder of the milk, if there is any excess, must be sold or disposed of as cream, for manufacturing purposes, or to be manufactured into other milk products. And for that excess, the distributor does not receive as high a price as he does for milk sold as fluid milk. Nor does he pay the farmer as much for milk so sold.

Class I milk, or milk sold for human consumption as fluid milk, thus brings the highest price. But since neither the distributor nor the producer knows from one day to the next how much of the milk will be sold as Class I milk, it is impossible to fix a price, fair to both, *at the time of the delivery of milk by the producer to the distributor.*

The distributor at the end of the month, or other period, as arrangements between him and the producer may require, settles his accounts and fairly apportions to the various classifications of milk the milk received from a particular producer and pays the producer accordingly. The price so paid to the producer of the milk is known as a "blended price".

In short, even where conditions are ideal,—even where the distributor obeys the regulations of the Director and charges the minimum prices established,—the producer does not receive a flat price, but a blended price. And he does not know, until the expiration of at least a thirty day period, what that blended price will be.

And whether he receives 50 per cent, or 60 per cent, or 70 per cent of the Class I price is unknown to him until long after the sales by the distributor have taken place.

Where, as here, the distributor breaks down the minimum prices established by the Director, the breakdown is not absorbed by the distributors, but is passed on to the farmer.

Where Class I milk is sold by the distributor *below* the price fixed by the Director for a marketing area, the situation is even worse. The distributor pays the producer proportionately upon the basis of *that lower* price, and not upon the basis of the established minimum. The producer receives less than the Act and the orders of the Director specify. The evils which the Act seeks to correct remain uncorrected. The conditions which the California Legislature sought to remedy remain uncorrected, and the entire structure of the stabilization plan established by the Director in a marketing area is upset.

That the producers of milk are injuriously affected by such a defeat of the expressed legislative will there can be no doubt. That the injury to the farmer has its resultant effect upon the consumer also cannot be doubted. By this debilitating process, the purchasing power of the producer is reduced. His ability to maintain a high standard for

his herd of dairy animals is likewise curtailed. Indeed, in some circumstances he will be forced out of business. These conditions are then reflected in a lower quality of milk produced and a lessening of the supply thereof to the detriment of the citizens of the State whose health and safety are jeopardized. Past experience has shown that serious curtailment of the milk supply has resulted directly from such price cutting practices.[2]

IV. CONCLUSION.

While it might be contended that the central aim of the federal government today is, in theory and in fact, to augment its power, and to drive ever larger and larger pipes into the diminishing reservoir of states' rights, that aim of political centralism has been checked in part, at least, by the recent cases.

Courts, state and federal, are coming more and more to the realization that there is actually no more evidence for the wisdom of an overcentralized federal government than there is that Friday is an unlucky day; to a realization, as well, that Mr. Justice Brandeis was right in finding for the states, ample scope in the Constitution—within their ambit. States, he felt, should not be hampered in dealing with evils at their point of pressure. Nor should the widest opportunity for experimentation be denied them by a construction of the Constitution, which would, in the words of Mr. Justice Cardozo "obliterate the distinction

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[2]The rapidly increasing populations in federal enclaves due to the war makes it more important that a realistic solution of the problem be reached.

between what is national and what is local in the activities of commerce". (*Schecter Poultry Corp. v. U S.*, 295 U. S. 495, 554, 79 L. ed. 1570 (1935).)

So far as the minimum prices for milk set up by the Director of Agriculture enter into the cost of milk purchased by the federal government agencies at Moffett Field, that is but a normal incident of the organization within the same territory of two independent sovereignties.

Dated, San Francisco, California,
January 6, 1943.

Respectfully submitted,

ROBERT W. KENNY,
Attorney General,
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Counsel for Appellees.

BARTLEY C. CRUM,
Of Counsel.

(Appendix Follows.)

Appendix

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 275

PACIFIC COAST DAIRIES, INC.,
Appellant,
vs.
DEPARTMENT OF AGRICULTURE, STATE OF CALIFORNIA, et al.,
Respondent.

AFFIDAVIT OF HAROLD G. CLAUDIUS,

Manager of Consolidated Milk Producers for San Francisco regarding effect on producers of sales by State distributors to Federal Agencies at below State minimum prices.

State of California,
City and County of San Francisco—ss.

Harold G. Claudius, being first duly sworn, deposes and says:

1. He is the Manager of Consolidated Milk Producers for San Francisco, a non-profit cooperative marketing corporation, organized and existing under and by virtue of the laws of the State of California, consisting of 165 members, all of whom are producers of fluid milk shipped to milk distributors shipping into the Santa Clara County, Alameda County and the San Francisco fluid milk marketing areas; that he has been duly authorized by the Board of Directors of Consolidated Milk Producers for San Francisco to make this affidavit on its behalf; that included

within said milk marketing areas are numerous federal enclaves.

2. The fluid milk so shipped to the San Francisco fluid milk marketing areas by the members of Consolidated Milk Producers for San Francisco is designed to be used for and to be consumed as fluid milk, and is so used and consumed within the limits of said San Francisco marketing area for fluid milk.

3. Of the total approximate 59,000 gallons of fluid milk used daily in the said San Francisco fluid milk marketing area, the members of petitioner ship daily to said area for use therein approximately 45,000 gallons of fluid milk.

4. Consolidated Milk Producers for San Francisco has an interest in the maintenance of stable and uniform prices to its members for such fluid milk used for and consumed as fluid milk, as provided in the stabilization and marketing plans of the California Director of Agriculture for the Santa Clara County, Alameda County and San Francisco marketing areas in this: that unless such stable and uniform prices provided therein are maintained for said fluid milk, the members of Consolidated Milk Producers for San Francisco will not receive the minimum prices therefor provided by California law, and the orders of the Director of Agriculture of the State of California made pursuant thereto; that unless the members of Consolidated Milk Producers for San Francisco and other producers of fluid milk do receive the said minimum prices provided by law, they will be unable to produce fluid milk of the grade and quality required by law, and will be unable to continue to produce fluid milk for sale to distributors in the various milk marketing areas.

5. Consolidated Milk Producers for San Francisco has an interest in the maintenance of the minimum wholesale and retail prices heretofore established by the Director of Agriculture of the State of California for the Santa Clara County, Alameda County and San Francisco fluid milk marketing areas, and other marketing areas throughout California in this: that unless said minimum wholesale and retail prices are maintained, the fluid milk distributors operating in said marketing areas and the other marketing areas in California will be unable to pay to the members of Consolidated Milk Producers for San Francisco and those similarly situated, the minimum prices required by law; and the members of Consolidated Milk Producers for San Francisco, and all those producers similarly situated, will receive far less than the minimum prices established by the Director of Agriculture of the State of California as necessary to effectuate the provisions and policies of Div. IV, Ch. 10 of the Agricultural Code of the State of California; with the result that the legislative purpose, namely to enable the dairy industry, with the aid of the State of California, to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk, will be defeated; and unfair, unjust, and demoralizing trade practices will be encouraged in the production, marketing, processing, and distribution of fluid milk in said San Francisco marketing area and to the injury of the members of Consolidated Milk Producers for San Francisco, and other producers of fluid milk in the State of California similarly situated, inferior standards of milk production and finally injurious effects on the public health.

6. Prior to the decision of the Supreme Court of the State of California in the above entitled case (namely the case of *Pacific Coast Dairy Inc., a corporation, petitioner, vs. Department of Agriculture of the State of California,* No. S. F. 16,694 on the files of said Supreme Court of the State of California), great confusion existed, to affiant's personal knowledge, in the minds of public officials, state and federal, as to whether, (1) under the California Act regulating the marketing and distribution of fluid milk and cream, fluid milk distributors were obliged to charge agencies of the United States the minimum prices established by the State Director of Agriculture, and, (2) whether, when such fluid milk distributors sold fluid milk to agencies of the United States at prices below the minima established by the California Director of Agriculture, they were required to pay to the producers of such fluid milk the minimum prices established by the California Director of Agriculture.

7. As a result of the uncertainty in interpretation of the law, many fluid milk distributors, both in the San Francisco fluid milk marketing area and elsewhere throughout the State of California, sold fluid milk to federal agencies at below the minimum prices established by the Director of Agriculture of the State of California; and such fluid milk distributors, in turn, paid the producers of such fluid milk, prices far below the prices established by the Director of Agriculture of the State of California, with a resulting loss to the producers of many thousands of dollars; that typical of the conditions existing in the various fluid milk marketing areas of the State of California, prior to the decision of the Supreme Court of California in the above entitled case are the sales by fluid

milk distributors to federal agencies and the prices by such fluid milk distributors to the fluid milk producers as described in paragraphs 8 through 18 of this affidavit.

8. On December 23, 1940, the Director of Agriculture of the State of California issued his General Order No. 116 declaring in effect as of January 1, 1941, schedules of zation and marketing plan for fluid milk as amended, together with rules and regulations pertaining thereto, for the San Francisco marketing area for fluid milk.

9. On December 23, 1940, the Director of Agriculture of the State of California issued his General Order No. 116 declaring in effect as of January 1, 1941, schedules of minimum wholesale and minimum retail prices for fluid milk as amended, together with rules and regulations pertaining thereto for the San Francisco marketing area for fluid milk.

10. On January 24, 1941, respondent, as Director of Agriculture, through the Bureau of Markets of the State Department of Agriculture, in accordance with the provisions of Table I of Article I of the stabilization and marketing plan, issued an order effective February 1, 1941, whereby the price to be paid to producers (including the members of Consolidated Milk Producers for San Francisco) by distributors for Class I fluid milk in the San Francisco area was fixed at 69¢ per pound milk fat in accordance with the provisions of Table I of Article I of the stabilization and marketing plan for fluid milk, as amended. This order became effective on February 1, 1941. In the same order of January 24, 1941, the Director of Agriculture of the State of California made effective, as of February 1, 1941,

the minimum wholesale and minimum retail prices for fluid milk contained in Schedule 4 of General Order No. 116 for the San Francisco marketing area.

11. Schedule 4 of General Order No. 116 for the San Francisco marketing area provided that the minimum wholesale price for fluid milk in quart containers should be 9½¢ per quart, and that the minimum wholesale price of fluid milk in half pint containers should be 3⅛¢ per half pint.

12. Under the provisions of section 1 of the rules and regulations of the Director of Agriculture of the State of California for the San Francisco marketing area, the minimum wholesale prices for fluid milk established for the San Francisco marketing area were declared to apply to all purchases of fluid milk made by agencies of the United States government, State of California, county, city, or other political subdivision of the State of California, hospitals or similar institutions, located within the geographical boundaries of said marketing area, and each of the fluid milk distributors operating and located in said San Francisco marketing area, affiant is informed by the California State Department of Agriculture, and believes, received a copy of said rules and regulations.

13. On March 7, 1941, the United States Quartermaster Supply Officer, San Francisco General Depot, located at Fort Mason, within territory ceded to the United States of America, generally known as the "Presidio", which is wholly within the geographical limits of the City and County of San Francisco and within said San Francisco marketing area, issued standard government form of invitation for bids (Supply Contract) No. 92-41-896—

Subsistence for the supplying, within the time specified, namely from April 1, 1941, to and including April 30, 1941, of 17,625 gallons of fluid milk, in quart and half-pint containers, to federal agencies located within the Presidio and within the geographical limits of the City and County of San Francisco and within said San Francisco marketing area. These invitations for bids called for the delivery of fluid milk to certain federal agencies located within the boundaries of the San Francisco Presidio in the following quantities and containers:

1. Milk, fresh, type II, Grade A, pasteurized, 6500 quarts in glass bottles to Letterman General Hospital in San Francisco.

2. Milk, fresh, type II, Grade A, pasteurized, 15,000 quarts in glass bottles to Fort McDowell in San Francisco.

3. Milk, fresh, type II, Grade A, pasteurized, 180,000 half-pints, in glass bottles or fibre containers to the Presidio in San Francisco.

4. Milk, fresh, type II, Grade A, pasteurized, 16,000 half-pints in glass bottles to Letterman General Hospital in San Francisco,

14. The opening date for bids to these federal agencies was Tuesday, March 25, 1941, at 10 A. M. at said Fort Mason; at said time and place various distributors of fluid milk, licensed as such distributors by the State of California, located in, and doing business within, the geographical boundaries of the San Francisco marketing area for fluid milk filed with the said Quartermaster Supply Officer their respective bids, proposing to furnish,

during the period April 1st to April 30, 1941, fluid milk to the various federal agencies described above in the quantities and in the containers as set forth in Government invitation to bid.

15. Among the bids so made at said time and place was the bid of Marin Dairymen's Milk Company, Ltd., a corporation duly licensed to do business in the State of California, with its principal place of business in the City and County of San Francisco, State of California, and within the geographical boundaries of said San Francisco marketing area; said distributor of fluid milk held and now holds a special distributor's license to deal in fluid milk, issued by Director of Agriculture of the State of California; also among said bids was the bid of Bell Brook Dairies, Inc., a corporation duly licensed to do business in the State of California, with its principal place of business in the City and County of San Francisco, State of California, and within the geographical boundaries of said San Francisco marketing area; said distributor of fluid milk held and now holds a special distributor's license to deal in fluid milk, issued by Director of Agriculture of the State of California; and also among said bids was the bid of Spreckels-Russell Dairy Co., Ltd., a corporation duly licensed to do business in the State of California, with its principal place of business in the City and County of San Francisco, State of California, and within the geographical boundaries of said San Francisco marketing area; said distributor of fluid milk held and now holds a special distributor's license to deal in fluid milk, issued by the Director of Agriculture of the State of California.

16. These distributors, described in the preceding paragraph of this affidavit, made bids to supply fluid milk to said federal agencies at prices less than the minimum wholesale prices for fluid milk in such containers fixed by the said Director of Agriculture in his General Order No. 116, and said bids were, on the 25th day of March, 1941, accepted by the Quartermaster Supply Officer, San Francisco General Depot, for and on behalf of the various federal agencies described; specifically said bids to supply said fluid milk to the aforesaid federal agencies were in the quantities, containers, and prices hereinafter specified:

a. Bell Brook Dairies, Inc., a corporation, made a bid to supply milk, fresh, type II, Grade A, pasteurized, 6500 quarts in glass bottles to Letterman General Hospital, located within the geographical boundaries of the San Francisco marketing area for fluid milk, at a unit price of $.08075 per quart, less 5%, or at a total amount of $498.63; whereas the minimum wholesale price for such milk in the quantity and container specified, under General Order No. 116 of the Director of Agriculture of the State of California, should have been a unit price of $.095 per quart, less 5%, or a total amount of $586.63.

b. Spreckels-Russell Dairy Co., Ltd., a corporation, made a bid to supply milk, fresh, type II, Grade A, pasteurized, 15,000 quarts in glass bottles to Fort McDowell, located within the geographical boundaries of the San Francisco marketing area for fluid milk, at a unit price of $.085 per quart, less 5%, or at a total amount of $1211.25; whereas the minimum wholesale

price for such milk in the quantity and container specified, under General Order No. 116 of Director of Agriculture of the State of California, should have been a unit price of $.095 per quart, less 5%, or a total amount of $1353.75.

c. Marin Dairymen's Milk Company, Ltd., made a bid to supply milk, fresh, type II, Grade A, pasteurized, 180,000 half pints, in glass containers to the Presidio of San Francisco, located within the geographical boundaries of the San Francisco marketing area for fluid milk, at a unit price of $.0224 per half pint, less 5%, or a total amount of $3830.40; whereas the minimum wholesale price for such milk in the quantity and container specified, under General Order No. 116 of the Director of Agriculture of the State of California, should have been a unit price of $.0315, less 5%, or a total amount of $5386.50.

d. Bell Brook Dairies, Inc., a corporation, made a bid to supply milk, fresh, type II, Grade A, pasteurized, 16,000 half pints in glass containers to the Letterman General Hospital in San Francisco, and located within the geographical boundaries of San Francisco marketing area for fluid milk, at a unit price of $.0264, less 5%, or a total amount of $401.28; whereas the minimum wholesale price for such milk in the quantity and container specified should, under General Order No. 116 of the Director of Agriculture of the State of California, have been a unit price of $.0315, less 5%, or a total amount of $478.80.

17. All of the fluid milk distributors described in paragraph 15 of this affidavit are distributors of fluid milk

within the said San Francisco marketing area and supplied fluid milk in accordance with their bids to said federal agencies for the period of April 1, 1941, to and including April 30, 1941; said distributors of fluid milk, in order to comply with the terms of their said bids paid the members of Consolidated Milk Producers for San Francisco, and other producers of fluid milk for said San Francisco marketing area similarly situated, prices far below the minimum prices established by respondent in his General Order No. 115.

18. As a result of the sales described in paragraphs 13 through 17 of this affidavit, and other sales of a similar nature, the members of Consolidated Milk Producers for San Francisco and those producers similarly situated, did not receive the 69¢ per pound milk fat ordered to be paid by the Director of Agriculture of the State of California for their milk shipped into the said San Francisco marketing area and sold for the period in question, but on the contrary receive a blended price of not more than 59¢ per pound milk fat.

19. Affiant is informed by the Bureau of Markets of the State Department of Agriculture, and believes that, prior to the decision of the Supreme Court of California in the above entitled case, such sales at below state minimum prices, and corresponding payment to producers at far below the minimum prices as described in paragraphs 13 through 17 of this affidavit were frequent and many; and that as a result thereof a general breakdown in the price structure for fluid milk as set up in the stabilization and marketing plans of the Director of Agriculture of the State of California was threatened, together with

a general breakdown in the schedule of minimum wholesale and minimum retail prices set up by the said Director of Agriculture.

20. Since the decision of the Supreme Court of the State of California in the above entitled case on March 12, 1942, affiant is informed by the Bureau of Markets of the State of California, and believes, that the licensed distributors of fluid milk in the various fluid milk marketing areas of the State of California, have uniformly charged for fluid milk sold to federal agencies, the minimum prices established by the Director of Agriculture of the State of California, and such fluid milk distributors have, in turn, paid the producers of such fluid milk the price which the Director of Agriculture of the State of California has found necessary to safeguard the public health.

21. Since 1941, and particularly since the outbreak of war, the increase in the consumption of fluid milk in federal enclaves located within the geographical boundaries of the State of California has increased enormously; that as of March, 1941, the average daily gallonage of fluid milk consumed in the San Francisco marketing area was approximately 45,000 gallons; that as of the date of the making of this affidavit, the average daily gallonage of milk consumed in the San Francisco marketing area is approximately 59,000 gallons; that of this increased consumption a large proportion (the amount whereof, for military reasons, affiant is unable to state) is consumed in federal enclaves located within the geographical boundaries of the San Francisco marketing area; that in the various other fluid milk marketing areas of California there

has been a similar large increase in the consumption of fluid milk in such federal enclaves as Fort Baker, Fort Barry, Benicia Arsenal Reservation, Fort Cronkhite, Fort Funston, Hamilton Field, Fort MacArthur, Fort McDowell, March Field, Fort Mason, Mather Field, McClellan Field, Fort Miley, Moffett Field, Muroc Bombing Field, Camp Ord, Presidio of Monterey, and San Diego Barracks.

Harold G. Claudius,
Manager of Consolidated Milk Producers for San Francisco.

Subscribed and sworn to before me this.....day of January, 1943.

(Seal)

Notary Public in and for the City and County of San Francisco, State of California.

BRIEF ON BE-
HALF OF AMICUS
CURIAE

FILE COPY

JAN 11 1943
CHARLES ELMORE CROPLEY

No. 275

In the Supreme Court of the United States

OCTOBER TERM, 1942

PACIFIC COAST DAIRY, INC., APPELLANT

v.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Summary of Argument	6
Argument:	
I. The judgment sought to be reviewed is final within Section 237 of the Judicial Code	8
II. The State of California may not regulate the price at which milk is sold to the United States	14
III. California may not forbid the handling of milk in California, which is sold and delivered on territory subject to the exclusive jurisdiction of the United States at prices below those fixed by State law	18
A. California may not regulate conduct within her borders for the sole purpose of controlling the price at which milk is sold on territory subject to the exclusive jurisdiction of the United States	18
B. California may not erect barriers to commerce between California and territory subject to to the exclusive jurisdiction of the United States for the purpose of fixing the price at which her products are sold in such territory	30
Conclusion	40
Appendix	42

CITATIONS

Cases:

A. & P. Tea Co. v. *Grosjean*, 301 U. S. 412	28
Alaska Packers Assn. v. *Comm.*, 294 U. S. 532	24, 26, 28, 29
Allgeyer v. *Louisiana*, 165 U. S. 578	26, 28
Arlington Hotel Co. v. *Fant*, 278 U. S. 439	19
Baldwin v. *Seelig*, 294 U. S. 511	8, 37, 38, 39
Bandini Co. v. *Superior Court*, 284 U. S. 8	9, 10, 14
Bruce v. *Tobin*, 245 U. S. 18	9
Bryant v. *Zimmerman*, 278 U. S. 63	9, 13
Case of the State Freight Tax, 15 Wall. 232	39
Cohens v. *Virginia*, 6 Wheat. 264	32
Collins v. *Yosemite Park*, 304 U. S. 518	19
Columbian Insurance Co. v. *Wheelright*, 7 Wheat. 534	9

Cases Continued. Page

Compania General de Tabacos de Filipinas v. *Collector*, 275 U. S. 87 ..... 20, 26, 28
Conn. General Co. v. *Johnson*, 303 U. S. 77 ..... 20, 28
Consolidated Milk Producers v. *Parker*, 19 Cal. (2d) 815 .. 15, 19, 23
Cooley v. *Board of Port Wardens*, 12 How. 299 33
Crandall v. *Nevada*, 6 Wall. 35 34
Detroit, etc. Ry. v. *Michigan R. R. Comm.*, 240 U. S. 564 .. 9
East Ohio Gas Co. v. *Tax Commission*, 283 U. S. 465 30
Edwards v. *California*, 314 U. S. 160 39
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426 ..... 24, 26
Foster Packing Co. v. *Haydel*, 278 U. S. 1 39
Galloway v. *Bell*, 11 F. (2d) 558 32
Grays Harbor Logging Co. v. *Coats-Fordney Co.*, 243 U. S. 251 ..... 6, 11, 13
Hanley v. *Kansas City So. Ry. Co.*, 187 U. S. 617 31
Hartman v. *Greenhow*, 102 U. S. 672 9
Holmes v. *Jennison*, 14 Pet. 540 9
H. P. Hood & Sons, Inc. v. *United States*, 307 U. S. 588 40
Inter-Island Steam Navigation Co. v. *Hawaii*, 96 F. (2d) 412, affirmed, 305 U. S. 306 31
James v. *Dravo Contracting Co.*, 302 U. S. 134 19
Laisne v. *California State Board of Optometry*, 19 Cal. (2d) 831 11
Luxton v. *North River Bridge Co.*, 147 U. S. 337 13
Michigan Central v. *Mix*, 278 U. S. 492 ..... 9, 14
Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346 35
Mt. Vernon Cotton Co. v. *Alabama Power Co.*, 240 U. S. 30 .. 9, 10
National Union Fire Insurance Co. v. *Wanberg*, 260 U. S. 71 28
Nebbia v. *New York*, 291 U. S. 502 36
Nelson v. *Sears, Roebuck & Co.*, 312 U. S. 359 28
New York, Lake Erie & W. R. R. Co. v. *Pennsylvania*, 153 U. S. 628 ..... 26, 29
O'Donoghue v. *United States*, 289 U. S. 516 32
Osborn v. *Ozlin*, 310 U. S. 53 ..... 24, 26, 27, 30
Palmetto Fire Insurance Co. v. *Conn*, 272 U. S. 295 28
Parker v. *Brown*, No. 46, this Term 37
Penn Dairies, Inc. and the United States of America v. *The Milk Control Commission of the Commonwealth of Pennsylvania*, No. 399, this Term 7, 15, 17
Pennsylvania Gas Co. v. *Public Service Comm.*, 252 U. S. 23 .. 30
Pennsylvania v. *West Virginia*, 262 U. S. 553 39
Public Utilities Commission v. *Landon*, 249 U. S. 236 30
Sioux Remedy Co. v. *Cope*, 235 U. S. 197 25
Skirotes v. *Florida*, 313 U. S. 69 20
South Carolina Hwy. Dept. v. *Barnwell Bros.*, 303 U. S. 177 .. 34, 38
Southern Railway Co. v. *Postal Telegraph-Cable Co.*, 179 U. S. 641 13

Cases—Continued.

	Page
St. Louis, B. & M. Ry. v. *Taylor*, 266 U. S. 200	9, 14
St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346	26, 28
Standard Oil Co. v. *California*, 291 U. S. 242	19
State Board v. *Young's Market Co.*, 299 U. S. 59	39
Stewart & Co. v. *Sadrakula*, 309 U. S. 94	19
Stoulenburgh v. *Hennick*, 129 U. S. 141	32, 33
Surplus Trading Co. v. *Cook*, 281 U. S. 647	19
Terral v. *Burke Construction Co.*, 257 U. S. 529	25
United States v. *Beatty*, 232 U. S. 463	13
United States v. *Rock Royal Co-operative*, 307 U. S. 533	40
United States v. *Unzeuta*, 281 U. S. 138	19
United States v. *Wrightwood Dairy*, 315 U. S. 110	40
Washington ex rel. McPherson Bros. Co. v. *Superior Court*, 274 U. S. 726	13
Washington ex rel. Perry v. *Superior Court*, 278 U. S. 575	13
Weston v. *City Council of Charleston*, 2 Pet. 449	9
Wick v. *Superior Court*, 278 U. S. 575	11
Wisconsin v. *J. C. Penney*, 311 U. S. 435	17, 28
Constitution and Statutes:	
U. S. Constitution, Art. I, § 8	16, 18, 29, 31, 33
Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. § 601, *et seq.*)	35, 40
State Statutes:	
California Milk Control Act (Cal. Agric. Code (Deering, 1937) Div. 4, c. 10, §§ 735–738, as amended Cal. Agric. Code (Deering, 1941 supp.), pp. 462–474):	
Sec. 735	14, 42
Sec. 736.3	14, 17, 22, 23, 35, 43
Sec. 736.10	14
Sec. 736.11	44
Sec. 736.12	14
Sec. 736.13	14, 15, 45
Sec. 737.7	14
Cal. Stats. 1935, p. 922	14
Cal. Stats. 1937, pp. 1372, 1376	14
Cal. Stats. 1941, Concurrent and Joint Resolutions, c. 65, p. 3402	23
Cal. Stats. 1941, c. 1214, p. 3011, sec. 3	23
Miscellaneous:	
Farrand, *Records of the Federal Convention*:	
Vol. II	37
Vol. III	37
Federalist, The, No. XLI	37
Federalist, The, No. XLII	34
H. Rep. No. 1241, 74th Cong., 1st Sess., pp. 22–23	36
Political Code of California, sec. 34	19
S. Rep. No. 1011, 74th Cong., 1st Sess., p. 15	36
U. S. Army Regulation 5–240 (g) (3)	17

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 275

PACIFIC COAST DAIRY, INC., APPELLANT

v.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 12, 1942, the Court entered an order inviting the Solicitor General to file a brief in this case, and if he so desires to participate in oral argument (R. 31). This brief is filed pursuant to that invitation.

OPINION BELOW

The opinion of the Supreme Court of California (R. 14–26) is reported in 19 Cal. (2d) 818.

JURISDICTION

The judgment of the Supreme Court of California was entered March 12, 1942 (R. 14, 26).

The petition for appeal was filed (R. 26) and allowed on June 4, 1942 (R. 28). The jurisdiction of this Court is conferred by Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925. On October 12, 1942, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits, and requested counsel to discuss in briefs and on argument whether the judgment sought to be reviewed was final within Section 237 of the Judicial Code (R. 31).

QUESTIONS PRESENTED

1. Whether the denial by the Supreme Court of California of the petition for a writ of mandamus in the circumstances of this case is a final judgment within the meaning of Section 237 of the Judicial Code.

2. Whether the State of California may regulate the price of milk sold to the United States.

3. Whether the State of California may forbid the handling of milk in California which is sold and delivered on territory subject to the exclusive jurisdiction of the United States at prices below those fixed by state law.

STATUTES INVOLVED

The applicable portions of the Agricultural Code of California are set forth in the Appendix, *infra*, pp. 41–45.

STATEMENT

On November 5, 1941, appellant, Pacific Coast Dairy, Inc., was served with an order issued by the Chief of the Bureau of Market Enforcement of the California Department of Agriculture requiring appellant to show cause at a hearing why its license as a distributor of fluid milk should not be suspended or revoked because of alleged violations of the California Agricultural Code (R. 6–7). The order was based on a complaint filed by the Auditor of the Bureau of Market Enforcement (R. 7–10). The facts alleged in the complaint may be summarized as follows:

Appellant is a corporation organized under the laws of California, doing business in the Santa Clara County Marketing Area in the State of California, and is a licensed distributor of fluid milk as defined by Section 753.3 (f) of the California Agricultural Code (R. 8). The Santa Clara County Marketing Area was established by General Order No. 98 of the Director of Agriculture of the State of California (R. 8), and at all times here involved there were in effect in that Area a Stabilization and Marketing Plan and Schedules of minimum wholesale and retail prices for fluid milk (R. 9). On or about October 15, 1941, appellant entered into a contract with the War Department, signed by the Quartermaster's Department of Moffett Field, whereby appellant agreed to sell and deliver fluid milk to the War Department at Moffett Field at less than the minimum price es-

tablished in the Santa Clara County Marketing Area (R. 9). Moffett Field is located in Santa Clara County about thirty-five miles southeast of San Francisco, California, and is in the geographical area within the outer, outside and external boundaries of the Santa Clara County Marketing Area as described in General Order No. 98 (R. 9).

The complaint alleged further that on or about November 1, 1941, appellant purchased, processed, bottled, transported and delivered in the Santa Clara County Marketing Area fluid milk which it sold at less than the effective minimum wholesale prices in the Area in violation of Section 736.3 (a) (6) of the Agricultural Code (Appendix, p. 42, *infra*), and concluded with a prayer that the Director of Agriculture hold a hearing and revoke appellant's license (R. 10).

On November 18, 1941 appellant filed a petition in the Supreme Court of California praying that a writ of mandamus issue directing appellees, who are officials of the State Department of Agriculture, to set aside the order to show cause issued on November 5, 1941 (R. 1–10). This petition, after stating the foregoing facts, alleged that Moffett Field was purchased more than fifteen years ago by the United States with the consent of the Legislature of California for the purpose of erecting forts, magazines, arsenals, dock-yards and other needful buildings (R. 4), that Moffett Field therefore is subject to the exclusive jurisdiction of the federal government (R. 4–5, 2) and that the State

of California has no jurisdiction over that area (R. 2). The petition also alleged that the acts of appellees constituted a wrongful and unlawful interference by the State of California with the administration of Moffett Field by the federal government in that the sales and deliveries complained of took place on Moffett Field (R. 2) that Section 736.3 (a) (6) of the Agricultural Code as applied was unconstitutional (R. 3) and that appellant was deprived of its property without due process of law. Finally, the petition set forth that appellant would suffer irreparable damage for which it had no adequate remedy at law (R. 3) and prayed for the writ of mandamus (R. 5–6).

On December 3, 1941, appellees moved to dismiss on the ground that the "petition does not state facts sufficient to constitute a cause of action or to enable petitioner to the relief prayed for in said petition or to any relief" (R. 12–13). Pursuant to leave of court, the United States filed a brief as amicus curiae (R. 14).

On March 12, 1942, the Supreme Court of California denied the petition for a writ of mandamus (R. 26). In its opinion (R. 14–26) the court concluded that Moffett Field was subject to exclusive federal jurisdiction (R. 22) but that the California statute as applied did not violate the Fourteenth Amendment (R. 17–21), was not invalid under the commerce clause of the Constitution (R. 21–25) and did not interfere with the governmental functions of the United States (R. 25–26).

SUMMARY OF ARGUMENT

I

The judgment denying the petition for a writ of mandamus is final and appealable under Section 237 of the Judicial Code. It is settled law that a special writ proceeding will ordinarily be regarded as a separate and distinct suit like replevin or ejectment, even though the judgment leaves some larger controversy undecided. The decision in *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, and the *per curiam* opinions following it do not throw doubt upon the principle. They resulted from the peculiar practice in the State of Washington of securing a writ of certiorari from the State Supreme Court to the Superior Court as an interlocutory appeal from an interlocutory order of the Superior Court condemning property for public use and ordering a hearing on the question of damages. The court held only that in this state of the local practice, the condemnation proceeding could not be regarded as broken into two separate suits. The mandamus proceeding in the instant case was plainly separate and distinct from the proceeding before the California Department of Agriculture.

II

California may not regulate the procurement of supplies for the United States Army and therefore may not regulate the price term of the contracts by which the United States Army purchases milk.

Although the section of the California Milk Control Act in question does not expressly fix the price, it is invalid for the same reasons as the Pennsylvania Milk Control Law. Those reasons are summarized at pages 14–17, *infra*, and are argued more at length in our brief in the companion case, *Penn Dairies, Inc. and the United States of America* v. *The Milk Control Commission of the Commonwealth of Pennsylvania*, No. 399, this Term.

III

A. The milk involved in the instant case was handled by appellant in California but was sold and delivery was completed on Moffett Field, which is territory under the exclusive jurisdiction of the United States. California was, therefore, powerless to regulate the sale; and this is admitted. It is said, however, that California can take appellant's license for handling in California milk later sold on Moffett Field at a price less than that specified by California. We submit that California cannot achieve the prohibited result by reliance upon this form of words. Appellant was not guilty of conduct in California which was itself contrary to the public policy of California. A State may not proscribe conduct within its jurisdiction for the purpose of regulating indirectly a subject beyond its competence to regulate directly because the Constitution has vested the power in Congress alone.

B. Under the commerce clause and under its power as both the general and local government to legislate for territory subject to its exclusive jurisdiction, the federal government has the same power to regulate commerce between a State and a federal enclave as it has to regulate commerce between two States. Similarly, that power is exclusive to the same extent as the power to regulate commerce between two States.

By the statute in question, California has expressly attempted to prohibit goods from flowing over her boundaries unless they are sold in the federal enclave at a price which California considers to be a sufficient return. But a State may not raise barriers to the movement of commerce and thus neutralize the consequences of free trade among the States and territories for the purpose of building up its local economy, even though ultimately the strengthening of the local economy will improve public health. *Baldwin* v. *Seelig*, 294 U. S. 511.

ARGUMENT

I

THE JUDGMENT SOUGHT TO BE REVIEWED IS FINAL WITHIN SECTION 237 OF THE JUDICIAL CODE

It is well settled by the decisions of this Court that an appeal may be taken under Section 237 of the Judicial Code from a final judgment in a proceeding for a writ of mandamus, prohibition or

habeas corpus. In such a case, two requirements must be met. First, the proceeding must be a separate suit. Second, the judgment must be dispositive of the suit, a matter which is "to be determined by the face of the record and the formal character of the judgment rendered" (*Bruce* v. *Tobin*, 245 U. S. 18, 19). Moreover, a judgment granting or denying an extraordinary writ ordinarily meets these two requirements, and is therefore appealable regardless of whether the judgment granting or denying the writ fails to dispose of some other, and larger, but separate controversy.[1] Such a proceeding is a separate suit just as much as an action of ejectment or replevin, or a proceeding in *quo warranto*. Cf. *Weston* v. *City Council of Charleston*, 2 Pet. 449, 464. A separate right is asserted—for example, to have another proceeding terminated which is doing irreparable damage to the petitioner—and is determined when the writ is granted or denied. Thus, in *Mt. Vernon Cotton*

[1] *Weston* v. *City Council of Charleston*, 2 Pet. 449 (prohibition); *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30 (prohibition); *St. Louis, B. & M. Ry.* v. *Taylor*, 266 U. S. 200 (prohibition); *Michigan Central* v. *Mix*, 278 U. S. 492 (prohibition); *Bandini Co.* v. *Superior Court*, 284 U. S. 8 (prohibition); *Columbian Insurance Co.* v. *Wheelright*, 7 Wheat. 534 (mandamus); *Hartman* v. *Greenhow*, 102 U. S. 672 (mandamus); *Detroit, etc. Ry.* v. *Michigan R. R. Comm.*, 240 U. S. 564 (mandamus); *Holmes* v. *Jennison*, 14 Pet. 540 (habeas corpus); *Bryant* v. *Zimmerman*, 278 U. S. 63 (habeas corpus).

Co. v. *Alabama Power Co.*, 240 U. S. 30, 31, the Court held:

> * * * Prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code * * *. The fact that it does not decide the merits of the principal suit is immaterial. It is not devoted to that point, but only to the preliminary question of the jurisdiction of the court in which that suit is brought.

The instant case meets both requirements. The mandamus proceeding in the Supreme Court of California was a distinct suit asserting the right to have the proceedings before the State Department of Agriculture terminated because they were unlawful and would do irreparable injury to the appellant. The suit was directed to that point and the judgment, which is final on its face, was dispositive. Indeed, there is no ground for distinction between the instant case and *Bandini Co.* v. *Superior Court*, 284 U. S. 8, which also arose in the Supreme Court of California. In the *Bandini* case the state court denied a writ of prohibition seeking to restrain enforcement of an injunction issued by an inferior state court against future violations of state law. This Court held that the judgment denying the writ was a "final judgment" in a "distinct suit," and that an appeal would lie. Although the writ in the *Bandini* case was prohibition, the writ of mandamus sought in the instant

case is for all practical purposes the same. Under California law administrative agencies cannot exercise judicial functions, and, since prohibition will issue only to arrest judicial or quasi-judicial proceedings, the writ of mandamus is used as a substitute. See *Laisne* v. *California State Board of Optometry*, 19 Cal. (2d) 831, 851–854.

The decisions in *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, and *Wick* v. *Superior Court*, 278 U. S. 575, do not lead to a contrary conclusion. In principle, they support our position that a judgment in a special writ proceeding is appealable if, first, the proceeding is a separate suit and, second, the judgment is final on its face. Both cases dealt with the peculiar procedure in condemnation cases in the courts of the State of Washington. Both decisions rested on the ground that in such cases the proceeding for a writ of certiorari in the State Supreme Court was not, under the State procedure, a separate suit but was a part of the condemnation proceeding. And the *Grays Harbor* case, if not the *Wick* case, also may rest upon the ground that the judgment was not final on its face. Both points are clear from the facts and the opinion in the *Grays Harbor* case, in which alone the Court delivered an opinion. The case was as follows:

A petition had been filed in the Superior Court of Washington to condemn certain lands. After a hearing, the Superior Court entered an order of

condemnation and set the cause down for a trial before a jury to determine and assess the damages. Under the Washington statutes, after an order of condemnation had been made and trial had taken place to determine the damages, an appeal would raise no question of the right to condemn but only the issue of damages. For this reason, the Washington Supreme Court granted a petition for certiorari in lieu of an appeal from the interlocutory order of condemnation and not as a separate proceeding. It then entered a judgment affirming the judgment of the Superior Court and "remitting the cause to that court for further proceedings." This Court dismissed a writ of error for want of jurisdiction because the state court judgment was not final. The opinion makes it clear that the ground of the decision was that the Court could not "in this state of the local practice" "regard a condemnation proceeding taken under the authority of the constitution of Washington and the Act of 1913 as severable into two distinct branches" (pp. 255, 256). The Court pointed out that orders condemning property and directing that a hearing be held on the question of damages were reviewed by the Washington Supreme Court "not because they are final, or are independent of the subsequent proceedings ascertaining the damages" but in order to allow an interlocutory appeal (p. 256). Since the proceedings were not separate, the case fell within the settled rule, established by

decisions cited in the opinion (p. 256), that an order in condemnation proceedings remanding the cause for the ascertainment of damages is not a final order.[2] Moreover, the order of the State Supreme Court was not final on its face because it expressly directed that the damages be ascertained, and conditioned the passing of title upon payment (p. 254); thus it failed also to meet the second requirement of appealability.

There is nothing, therefore, in the *Grays Harbor* case, or in the line of *per curiam* opinions following it,[3] to suggest that the Court intended to modify the well settled rule that a special writ proceeding would be regarded as a separate suit, terminating in a final and appealable judgment, if in the state courts it was a separate proceeding. On the contrary, the Court has recognized that those condemnation cases, arising from the State of Washington, rested on the ground that the application for certiorari was a "fragmentary or branch proceeding" (*Bryant* v. *Zimmerman*, 278 U. S. 63, 71), and the Court has continued to hear appeals from orders granting or denying prohibition or mandamus where, as here, the application

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[2] *Luxton* v. *North River Bridge Co.*, 147 U. S. 337; *Southern Railway Co.* v. *Postal Telegraph-Cable Co.*, 179 U. S. 641; *United States* v. *Beatty*, 232 U. S. 463.

[3] *Washington ex rel. McPherson Bros. Co.* v. *Superior Court*, 274 U. S. 726; *Washington ex rel. Perry* v. *Superior Court*, 276 U. S. 626; *Wick* v. *Superior Court*, 278 U. S. 575.

was separate and distinct from the proceedings sought to be stayed. *Bandini Co.* v. *Superior Court*, 284 U. S. 8; *Michigan Central* v. *Mix*, 278 U. S. 492; *St. Louis, B. & M. Ry.* v. *Taylor*, 266 U. S. 200.

II

THE STATE OF CALIFORNIA MAY NOT REGULATE THE PRICE AT WHICH MILK IS SOLD TO THE UNITED STATES

The California Milk Control Act under which this case arose[4] declares the production and distribution of fluid milk and fluid cream to be a business affected with a public interest (Sec. 735), and vests in the Director of Agriculture of California authority to prescribe and enforce minimum wholesale and retail prices in any marketing area (Secs. 736.10 and 736.12). Distributors are forbidden to sell or to offer to sell fluid milk to any consumer at less than the prices established by the Director (Sec. 736.13). Distributors are also forbidden to purchase, process, bottle, transport, deliver, or otherwise handle milk which is to be sold in a federal enclave at prices less than the minimum prices prescribed by the Director of Agriculture for the marketing area in which the enclave is located (Sec. 736.3 (a) (6)). Violation of either of these sections by a distributor is a misdemeanor as well as ground for revoking or suspending its license to do business (Sec. 737.7). The provision

[4] Cal. Stats. 1935, p. 922; Cal. Stats. 1937, pp. 1372, 1376 (Cal. Agricultural Code, Div. 4, c. 9, Secs. 735–738).

for violation of which the Director of Agriculture sought to cancel appellant's license is the second of these sections, Section 736.3 (a) (6).

It is clear that California may not regulate the price at which the milk is sold to the United States at Moffett Field. The court below so held in *Consolidated Milk Producers* v. *Parker*, 19 Cal. (2d) 815, decided contemporaneously with the instant case, on the ground that the State had no jurisdiction to fix the price at which milk was sold on a federal enclave (see pp. 18–20, *infra*). The State has not in this case contended to the contrary. Moreover, regardless of where the sales took place, Section 736.13, forbidding distributors to sell at prices below those fixed by State authority, would be invalid as applied to sales to the United States. The reasons, which are set forth in our brief in *Penn Dairies, Inc. and the United States of America* v. *The Milk Control Commission of the Commonwealth of Pennsylvania*, No. 399, this Term, may be summarized as follows:

A State may not regulate the United States in the performance of its governmental functions even by a nondiscriminatory statute of general application. A regulation of the price at which the seller may sell fixes one term of the contract of sale and purchase, and therefore is a direct regulation of the terms on which the buyer must buy even though he is not named in the law. The instant case is to be distinguished from a tax collected from

a seller who deals with the United States but who, so far as the law is concerned, may absorb any part of the tax. It is analogous to the situation which would be presented if a State levied a sales tax on sales to the United States and required the seller to collect the tax from the buyer. The legal incidence of the Milk Control Act, therefore, is on the buyer of the milk as immediately and fully as if it were formally addressed to him. Consequently, where the United States is buyer, application of the Milk Control Act to the sale is an attempt unconstitutionally to regulate a federal governmental function; indeed it is also an attempt to exercise power over the support of the Army and is unconstitutional because that power is vested exclusively in the United States (U. S. Const. Art. I, sec. 8, cl. 17).

We submit for the same reasons that Section 763.3 (a) (6), prohibiting the handling of milk later sold at a price less than that fixed by California, is, as applied to federal purchases, an unconstitutional regulation of the United States. This section prohibits on conditions the "purchasing, processing, bottling, transporting, delivering, or otherwise handling" of milk, and the conditions are price conditions. The lawfulness of the handling therefore depends entirely upon the price which is received at a subsequent sale. This section, as the inevitable and intended result of its terms and not as the result of any business arrange-

ment, regulates the price at which the United States may purchase exactly as does the price law itself. Indeed, that is its only purpose and would be its only result (see pp. 21–23, *infra*). The actual impact of the statute and not the verbal formula must determine its "legal incidence" and constitutionality. Cf. *Wisconsin* v. *J. C. Penney*, 311 U. S. 435, 443–444. Section 736.3 (a) (6), therefore, is invalid for the same reasons as the direct price regulations involved in Section 736.13.

In our brief in the *Penn Dairies* case we have also shown (pp. 31–39) that State minimum price laws cannot be validly applied to purchases by the United States because they are inconsistent with the procurement program established by Acts of Congress. We do not repeat the argument here, for any distinction between the Pennsylvania and California laws is immaterial on this aspect of the case; the inconsistency is not a matter of words but is fundamental.[4]

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[4] Unlike the Supreme Court of Pennsylvania in the *Penn Dairies* case, the court below relied upon Regulation 5–240 (g) (3) of the United States Army in support of its proposition that the competitive bidding statutes were not applicable "when the price is fixed by Federal, State, municipal, or other competent authority" (R. 26). As we have pointed out in our brief in the *Penn Dairies* case (pp. 35–36), the record in that case shows that the regulation was not intended and is not construed by the War Department to excuse competitive bidding under such circumstances. Moreover, as we have also pointed out in that brief, the regulation would not be binding if its meaning is contrary to the Acts of Congress.

There are, however, additional grounds for reversal in this case, which are not present in the *Penn Dairies* case. The California Milk Control Act, we submit, is invalid as applied to the purchases made by the United States at Moffett Field because the State of California has no jurisdiction over that enclave.

III

CALIFORNIA MAY NOT FORBID THE HANDLING OF MILK IN CALIFORNIA, WHICH IS SOLD AND DELIVERED ON TERRITORY SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE UNITED STATES, AT PRICES BELOW THOSE FIXED BY STATE LAW

A. *California may not regulate conduct within her borders for the sole purpose of controlling the price at which milk is sold on territory subject to the exclusive jurisdiction of the United States.*

The contract for the sale of milk to the United States, entered into by appellant and the War Department, was signed by the Quartermasters' Department of Moffett Field, and the sale and delivery of the milk took place on Moffett Field (R. 2, 9, 15). Moffett Field is located in Santa Clara County, California, about 35 miles southeast of San Francisco (R. 9). More than fifteen years ago, it was purchased by the United States for the purpose of erecting forts, magazines, arsenals, dockyards and other needful buildings, and is still used by the Government for such purposes (R. 4). Article 1, section 8, clause 17 of the Federal Constitution provides that Congress shall have power

to "exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Section 34 of the Political Code of California (R. 4) gave consent to the purchase, and accordingly, the power of "exclusive legislation" was vested in the United States. *Standard Oil Co.* v. *California*, 291 U. S. 242; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647; *United States* v. *Unzeuta*, 281 U. S. 138; *Arlington Hotel Co.* v. *Fant*, 278 U. S. 439. Cf. *Collins* v. *Yosemite Park*, 304 U. S. 518; *James* v. *Dravo Contracting Co.*, 302 U. S. 134.*

In view of these decisions the State apparently does not contend that it can regulate the price at which goods are sold on Moffett Field. The court below so decided in *Consolidated Milk Producers* v. *Parker*, 19 Cal. (2d) 815. Its decision is plainly right under *Standard Oil Co.* v. *California*, 291 U. S. 242, 245, wherein this Court held:

> * * * A State cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States.

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* In order to maintain continuity of law, the law of the area continues in effect after acquisition by the federal government, but it is the law of the federal government and not of the State. Subsequent state laws do not modify the law of the area. See *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94. The California Milk Control Act was enacted after the United States acquired Moffett Field (see pp. 14, 18, *supra*).

Likewise, we understand that there is no contention that California may regulate appellant's conduct in a federal enclave by reason of the fact that appellant is a California corporation (R. 1); the contract of sale involved was made and was to be performed outside California, and the purchaser, the United States, of course was not a corporation which had sought the privilege of doing business within California. For this transaction, therefore, "no privilege or license by California was needful" (*Conn. General Co.* v. *Johnson*, 303 U. S. 77, 82). Appellant clearly had the right to make contracts outside California and beyond her jurisdiction without regulation by California. *Compania General de Tabacos de Filipinas* v. *Collector*, 275 U. S. 87, 92; *Alaska Packers Assn.* v. *Comm.*, 294 U. S. 532, 540, and cases cited.[7]

Skiriotes v. *Florida*, 313 U. S. 69, is not to the contrary. There the Court held that in the absence of conflicting federal legislation Florida could regulate the conduct of its citizens upon the high seas. But there is a clear difference between regulating the conduct of a citizen on seas over which no other sovereignty asserts jurisdiction and regulating conduct within territory subject to the exclusive jurisdiction of another sovereignty in a matter of its domestic affairs.[8] The distinction has always been silently observed; in the cases holding that the

[7] See p. 27, n. 12, *infra*.

[8] See p. 29, n. 13, *infra*.

State may not legislate effectively concerning matters occurring in territory subject to the exclusive jurisdiction of the United States no inquiry has been made into the question of citizenship. Any other rule would create embarrassing conflicts of authority, would enable one State to interfere with the domestic policies of the other and would disrupt the federal system. We take it as our premise, therefore, as did the court below, that California may not regulate the price at which milk is sold by appellant on Moffett Field.

The question is whether California may consistently with due process avoid the foregoing limitation of her powers and revoke appellant's license because it *handled* milk in California which was subsequently sold on Moffett Field at prices below those fixed by the State law. We submit that such revocation would take appellant's property without due process of law, basing our contention upon two propositions. First, in handling the milk appellant was guilty of no act or omission in California which was itself contrary to the public policy of California; California has seized upon such acts for the sole purpose of regulating contracts made beyond its borders, which it lacks jurisdiction to control directly. Second, while a State may forbid conduct within its borders that is itself contrary to its public policy regardless of the repercussions beyond its borders, it may not regulate conduct, otherwise within its competence to control, for the sole

purpose of regulating matters beyond its jurisdiction, even though the repercussions of the conduct beyond its jurisdiction in turn affect local policies.

1. It is clear that we have characterized Section 736.3 (a) (6) of the Milk Control Act fairly. The declaration of policy prefacing the Act sets forth the purpose to promote orderly marketing of essential agricultural commodities and to ensure an adequate supply of wholesome milk. The acts done by appellant in California which are covered by Section 736.3 (a) (6)—"purchasing, processing, bottling, transporting, delivering or otherwise handling" milk—manifestly were not contrary to that policy. Section 736 (a) (6) conditions their lawfulness entirely upon what is done outside California. If the milk is sold outside California at one price, the handling is lawful; if it is sold at another price, the handling is unlawful. In each case the acts done in California are precisely the same. Clearly, then, handling itself is not against the policy of the State. The only act done by appellant which California deemed inimicable to her welfare was to sell milk in the federal enclave at lower prices than the state authorities prescribed and this appellant was free to do (see pp. 18-20, *supra*).

The legislative history of Section 736.3 (a) (6) also shows that its only purpose is to prevent

such sales. Prior to 1941 the Milk Control Act contained price-fixing provisions, which the California authorities evidently believed to be ineffective to fix prices for sale of milk in federal enclaves. See *Consolidated Milk Producers* v. *Parker*, 19 Cal. (2d) 815. On April 28, 1941, a Senate Joint Resolution was adopted by California, memorializing the Congress of the United States to enact legislation requiring the federal government to comply with the California Milk Control Act.[9] Congress failed to respond and California passed the amendment in question, which was approved by the Governor on July 16, 1941.[10]

Although the court below said (R. 21) that the State had regulated the handling of fluid milk within its jurisdiction with the object of stabilizing the production of a commodity vital to the public health, nevertheless the court below also recognized that appellant's acts in California were not themselves contrary to the public policy of the State. The court explained that the "most real danger to the prescribed minimum lies in sales by distributors at lower prices on areas within the exclusive jurisdiction of the federal government, where transactions cannot be regulated by the State" (R. 18). The purpose of Section 736.3 (a) (6) the court said was to deal with these "elusive evils"

[9] Cal. Stats. 1941, Concurrent and Joint Resolutions, c. 65, p. 3402.

[10] Cal. Stats. 1941, c. 1214, p. 3011, sec. 3.

(R. 18), and later it pointed out that "*the State is concerned * * * with the effect of the price* * * * (R. 21).

2. The fact that none of the acts specified in Section 736.3 (a) (6), and no other act done by appellant within California, was itself contrary to the public policy of the State is decisive of the invalidity of that section. It is true in a general sense that California has power to regulate appellant's conduct within California and "that a State may exercise its power over things within its jurisdiction in the knowledge that it will thereby influence things beyond its jurisdiction, and that its influence may be far reaching, so long as the external consequences remain incidental to the solution of internal problems" (R. 21). But this Court has ruled (*Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434):

> * * * it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as a part of a scheme to accomplish a forbidden result. * * *

While, therefore, a State may forbid, regardless of repercussions beyond its borders, any conduct within its borders (whether an act or an omission to act) that is contrary to its public policy (*Osborn* v. *Ozlin*, 310 U. S. 53, 62–63; *Alaska Packers Assn.*

v. *Comm.*, 294 U. S. 532, 541), a State may not seize upon innocent acts otherwise permitted in order to regulate conduct which the State is forbidden to reach because it takes place in territory subject to the exclusive jurisdiction of the United States. Any other conclusion would enable a State to stultify the Constitution by a careful choice of words.

There are many illustrations of the principle stated in the *Tafoya* case. A State may fix conditions on which it will open its courts but it may not deny access to its courts to a foreign corporation seeking to collect the price of goods sold in interstate commerce until the corporation agrees to appoint an agent in the State for service of process; the condition would regulate interstate commerce. *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 203. Similarly, a State may not condition the license of a foreign corporation to do a local business upon its refraining from suing or defending in the federal court. *Ferral* v. *Burke Construction Co.*, 257 U. S. 529. In both these cases the State had a "right" to regulate the subject matter but the statute was invalid because it seized upon that subject merely as a means of controlling indirectly conduct beyond its competence to control directly because the power of control was vested exclusively in the federal government.

The same principle prevents a State from using things within its borders as a fulcrum for regulating conduct beyond its territorial jurisdiction. A

State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the corporation has tracks and does business within the state. *New York, Lake Erie & W. R. R. Co.* v. *Pennsylvania,* 153 U. S. 628, 646. In the *Tafoya* case a State statute forbidding insurance companies authorized to do business in the State to make payments to nonresidents of premiums on risks within the State was held unconstitutional. It was thought that this was not a regulation of the business of the insurance company within the State, but was directed exclusively at the making of contracts beyond its borders. Similarly, "a state may not penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state" (*Alaska Packers Assn.* v. *Comm.,* 294 U. S. 532, 540). *Allgeyer* v. *Louisiana,* 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346, 348; *Compania General de Tabacos de Filipinas* v. *Collector,* 275 U. S. 87.

Whatever doubt they may cast upon its application in some cases, subsequent decisions have not modified the principle that "a so-called right" may not be used "as a part of a scheme to accomplish a forbidden result." (*Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434).[11] In the cases chiefly

[11] There may be some question concerning the extent to which the *Tafoya* case has been overruled by *Osborn* v. *Ozlin,* 310 U. S. 53. In both cases the State had a legitimate interest in building up local insurance agencies by requiring

relied upon by the court below those acts or omissions to act within the State which the State statutes proscribed were themselves against the public policy of the State. In the special circumstances revealed in the *Alaska Packers* case, California had a legitimate interest in requiring compensation to be made by the company doing business in California for injuries received outside its borders by employees who annually returned to California at the close of the season to collect their wages. Making an employment contract in California which required the workman to return there and then failing to pay him compensation for his injuries from an industrial accident, was conduct which was itself opposed to the public policy of the State. Similarly, the acts discouraged by the Virginia statute sustained in *Osborn* v. *Ozlin*, 310 U. S. 53—doing business in Virginia by writing policies on local risks without payment of a commission ensuring the active use of resident agents—was itself opposed to the public policy of Virginia, which had a permanent interest in the local risk and in stimulating the activities of local agents charged with protecting the property from destruction. The *Ozlin* case specifically recognized and

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that payments be made to them in connection with local risks, for such a measure would tend to protect property within the State. The two cases are distinguishable in that it might be thought arbitrary and capricious to prohibit all payments to agents outside the State in connection with local risks, whereas it would be a reasonable measure simply to require that some payments be made to the local agencies.

distinguished those instances, like the instant case, in which a "so-called right is used as part of a scheme to accomplish a forbidden result" (p. 65).[12]

It is, of course, immaterial that California was seeking to regulate the selling price of milk in the

[12] There is a second difference between cases sustaining state taxation or regulation of extra state transactions and the case at bar. In those cases, either the transaction was itself local (e. g., *National Union Fire Insurance Co.* v. *Wanberg*, 260 U. S. 71; *Palmetto Fire Insurance Co.* v. *Conn*, 272 U. S. 295) or at least was consummated between two parties who were residents of, or were authorized to do business in, the State. *Compania General de Tabacos de Filipinas* v. *Collector*, 275 U. S. 87; *Alaska Packers Assn.* v. *Comm.*, 294 U. S. 532; *Osborn* v. *Ozlin*, 310 U. S. 53. For this reason, *A. & P. Tea Co.* v. *Grosjean*, 301 U. S. 412; *Wisconsin* v. *J. C. Penney*, 311 U. S. 435; and *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, do not support the decision below. The regulation of a company authorized to do business within a State, in respect of its business with residents of the State, although consummated outside, was held to be a legitimate "burden as a price of enjoying the full benefits flowing from" its local business. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 364. The Court specifically noted, however, that the regulations would not be valid as applied to companies not qualified to do business within the State, and this as a result of the "impotence of state power" (*id.*). On the other hand, wherever a State has sought to tax or regulate a transaction between a resident of the State or a company doing business in the State and a company not doing a local business, the Court has held the tax or regulation to be unconstitutional. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346; *Compania General de Tabacos de Filipinas* v. *Collector*, 275 U. S. 87; cf. *Conn. General Co.* v. *Johnson*, 303 U. S. 77. In the case at bar, the contract was made and to be performed out of the State of California. The purchaser, the United States, was not a corporation

federal enclave in order to effectuate a reasonable State policy. It is no more permissible for a State to carry out local policies by indirectly regulating matters beyond its competence than it is for the State to do so by direct control. Thus, in the *Tafoya* case the statute was directed to the legitimate policy of building up responsible insurance agencies within the State, and in *New York, Lake Erie & W. R. R. Co.* v. *Pennsylvania, supra,* the State statute aided in the collection of a lawful tax. But the means chosen were invalid because they regulated conduct outside the State.

We submit, therefore, that the challenged section of the Milk Control Act is an unconstitutional attempt by California to regulate the price at which milk is sold in territory subject to the exclusive jurisdiction of the United States. The power to regulate such prices is vested exclusively in the United States (U. S. Const., Art. I, Sec. 8, cl. 17). As a result the question here is not merely whether California may interfere in the domestic affairs of another State in order to carry out her policies, but

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which had sought the privilege of doing business in the State, and, indeed, had done no business in California. This was a contract made and to be performed outside of California "and for its transaction no privilege or license by California was needful." *Conn. General Co.* v. *Johnson,* 303 U. S. 77, 82. Under this view the statute here involved fails to meet the fundamental requirement of due process that a State cannot "penalize or tax a contract entered into and to be performed outside the state, although one of the contracting parties is within the state." *Alaska Packers Assn.* v. *Comm.,* 294 U. S. 532, 540.

is whether it can exercise by indirection the power of exclusive legislation which the Constitution vests in Congress.[13] No form of words enables a State to reach "beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere" (*Osborn* v. *Ozlin*, 310 U. S. 53, 62). The direction not to handle in California milk sold in the federal enclave at prices below those fixed by State law was therefore a nullity and appellant's failure to comply was no wrong. It would be arbitrary, unreasonable and a denial of due process for the appellees' officials to revoke the license without lawful grounds.

B. *California may not erect barriers to commerce between California and territory subject to the exclusive jurisdiction of the United States for the purpose of fixing the price at which her products are sold in such territory.*

In the preceding section we have argued that California may not proscribe *any* conduct within

[13] It seems probable that a State of import could regulate the prices to be charged consumers on local sales of milk in the State in the absence of inconsistent federal legislation. *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465; *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U. S. 23; *Public Utilities Commission* v. *Landon*, 249 U. S. 236. Any limitations arising from the commerce clause upon the power of a State of import to fix such price would not apply to Congress, for when it legislates for an enclave, Congress exercises the powers both of a State and general government. See pp. 31–32, *infra*.

its boundaries (which is not itself opposed to the public policy of the State) for the sole purpose of fixing the price at which milk is sold on a federal enclave. In addition, the California statute must fall because the conduct which the statute attempts to regulate is the preparation and transportation of milk which is to move outside the State; the statute expressly forbids the movement of milk from California into the federal enclave unless the price at which it is sold in the enclave is considered adequate by California authorities to build up the economy of the State. California has no more authority to regulate such commerce than it would have if Moffett Field were in another State, and, if this commerce were interstate, California could not constitutionally erect the barrier which is here involved.

1. Although Article I, section 8, cl. 3, of the Constitution expressly grants to Congress only the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes", the court below concluded that the power to regulate commerce between a State and federal territory was also conferred by this provision (R. 22–23). Notwithstanding verbal difficulties, this view finds strong support in the decisions of this Court. It has been held that commerce between a territory and a State is interstate commerce (*Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; cf. *Inter-Island Steam Navigation Co.* v.

Hawaii, 96 F. (2d) 412, affirmed, 305 U. S. 306), and that Congress cannot delegate power to a local body to regulate commerce between a State and the District of Columbia because such commerce falls "within the domain of the great, distinct, substantive power to regulate commerce * * *." (*Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147, 148). Cf. *Galloway* v. *Bell*, 11 F. (2d) 558 (App. D. C.). Territory ceded by the States to the federal government has a constitutional status identical with that of the District. The federal jurisdiction over both is derived from the same clause of the Constitution (U. S. Const., Art. I, Sec. 8, cl. 17).

But it is unnecessary to rely upon the commerce clause alone. Article 1, Sec. 8, cl. 17 grants to Congress the power of "exclusive legislation" over territory ceded by a State and this authority is enlarged by the "necessary and proper clause" to include power to enact all appropriate incidental legislation. In respect of such territory, therefore, Congress has "the combined powers of a general and a State government" (*Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147). It may regulate the local affairs of a federal enclave in a local way or it may extend the legislation into the States to achieve its purposes wherever "necessary and proper." *Cohens* v. *Virginia*, 6 Wheat. 264, 424–428, 447; *O'Donoghue* v. *United States*, 289 U. S. 516, 538–539. Consequently Congress certainly has an affirmative power over commerce between a State and a federal enclave which is at least as

great as its power over commerce between two States. It may determine the terms and conditions upon which goods may enter and leave an enclave and may remove any obstructions to the flow of goods into an enclave even though the obstruction exists on State territory. Moreover, as *Stoutenburgh* v. *Hennick, supra,* shows, this power is possessed by the Congress as part of the powers of the general government and not as one of the powers of a State.

The question, therefore, is whether the grant of affirmative power to Congress to regulate commerce between a State and a federal enclave by implication forbids a State to regulate such commerce. We believe that the power of Congress is exclusive at least to the same extent that the power of Congress over commerce between two States is exclusive. In the first place, Article 1, Sec. 8, cl. 17, expressly provides that the power of Congress to legislate for federal enclaves shall be "exclusive", and this definition must be as applicable in respect of the commerce of the enclave as in respect of its purely domestic affairs. Secondly, the analogy of the commerce clause is persuasive. Although the commerce clause does not explicitly forbid the States to regulate interstate commerce which Congress has not regulated, yet it is held that the States are powerless to do so when the matter is not one of local concern (*Cooley* v. *Board of Port Wardens,* 12 How. 299) or "when state legislation nominally of local concern is in point of fact aimed

at interstate commerce" (*South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185–186). Such decisions stemmed from the knowledge that the Constitution embodied the political judgment that the welfare of the former colonies required the prevention of trade discriminations and the elimination of State imposed barriers or obstacles to the free flow of goods between two States, excepting only restraints imposed by a federal authority. To have permitted a State to erect barriers to the movement of goods in order to build up its economy at the expense of territory subject to exclusive federal jurisdiction would have been little less disturbing to the economy of the federal territory and, in addition, would have seriously embarrassed the activities of the new federal government. And it is wholly unreasonable to suppose that the Constitutional Convention intended to leave the States greater power to interfere with or destroy the economy of federal territory by erecting trade barriers than they were to be permitted to exercise in respect of each other. Cf. *Crandall* v. *Nevada*, 6 Wall. 35; *The Federalist*, No. XLII (Dawson's ed. 1863).

2. Judging the power of California over the commerce here involved by the tests applicable to barriers to interstate commerce, it is clear that the prohibition against handling milk in California which is sold in the federal enclave at a lower price that California considered proper is unconstitu-

tional. The court below sustained the statute on the ground that the dairying industry was dominantly a matter of local concern. It held (R. 23):

> Focussed as it is upon a State problem the State act *despite its repercussions upon interstate commerce*, does not run counter to the commerce clause so long as it does not conflict with the provisions or objectives of Congressional legislation. [Italics added.]

Milk Control Board v. *Eisenberg Farm Products*, 306 U. S. 346, was considered a controlling precedent.[14]

But this description of the State law scarcely fits its provisions. Section 736.3 (a) (6) does more than affect commerce between California and federal enclaves through "its repercussions." By expressly proscribing "transporting" and "delivering" such milk, it forbids any dealer to engage

[14] The court below considered the question whether the California Milk Control Act was invalid because Congress had legislated in the same field by enacting the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, reenacting and amending certain sections of the Agricultural Adjustment Act of 1933, 48 Stat. 31. It concluded that there was no conflict because no federal milk marketing order had been issued covering the area in question. We agree that there is no conflict between the sections of the California statute which are involved here and the Agricultural Marketing Agreement Act. The former fix minimum prices to be paid by retailers or consumers to dealers; the latter chiefly authorizes the Secretary to fix minimum prices to be paid by dealers to producers. Section 10 (i) of the Agricultural Marketing Agreement Act shows plainly that there was no intention to exclude the States from fixing minimum

in such commerce unless he charges persons in the enclave a price fixed by California law. Likewise, the *Eisenberg Farm Products* case is not even persuasive here. No question is raised here concerning the validity of those provisions of the Milk Control Act which fix the prices to be paid by handlers to producers. That was the only question presented in the *Eisenberg Farm Products* case, for, as the Court carefully pointed out (306 U. S. 346, 352):

> The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York, * * *

In the instant case, California has sought to fix

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resale prices for milk, a field in which they had long legislated (See e. g. *Nebbia* v. *New York*, 291 U. S. 502). And the committee reports state (H. Rep. 1241, 74th Cong., 1st Sess., pp. 22-23; S. Rep. 1011, 74th Cong., 1st Sess., p. 15):

> Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to permit or require the Federal Government to invade the field of the States, for the limitations of the act and the Constitution forbid Federal regulation in that field, and this provision does not indicate the contrary. Nor is there anything in the provision to force States to cooperate. Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other.

It is apparent, therefore, that Congress intended to leave to the States their full constitutional power in regard to resale prices but recognized, of course, that the constitutional restrictions would continue to be binding.

the price at which the milk is sold in the federal enclave. The purpose is to retain the wealth of her citizens and build up her economy at the expense of persons within the enclave by prohibiting the former from exporting milk to be sold at prices considered by California to be detrimental to her economy. This is plainly beyond California's power. It has always been recognized that a great purpose of the commerce clause was to deprive the States of power to fix terms upon which they would permit the movement of legitimate articles of commerce into or out of a State in order to build up or protect the local economy at the expense of persons in other States. II Farrand, *Records of the Federal Convention*, p. 208; III *id.*, pp. 478, 547, 548; *The Federalist*, No. XLI (Dawson's ed. 1863).[15]

The decision in *Baldwin* v. *Seelig*, 294 U. S. 511, not only illustrates the principle but is a precise precedent for our position. The Court held that the State of New York could not exclude, or prohibit a dealer from selling within her borders, milk purchased in the State of Vermont at a price be-

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[15] *Parker* v. *Brown*, No. 46, this Term, is not to the contrary. The California statute as here applied is not a regulation of persons not engaged in commerce whose products later move in commerce but "a regulation of those who engage in the commerce by selling the product interstate" (p. 14). And, even though the matter is one suited to local regulation of some kinds, it is clear, for reasons stated above, that a State may not erect an export barrier by fixing the price to be charged for its goods *after* they have left the State.

low that which another and valid section of the New York statute required to be paid to New York producers. The converse situation is presented here. California is seeking to prohibit a dealer from handling within her borders milk sold in the enclave at a price below that which another section of the statute requires to be paid by California purchasers. But in each case the attempt is to preserve local wealth by preventing free trade among the States. In *Baldwin* v. *Seelig*, the barrier was intended to improve the economic condition of domestic producers by preventing dealers from importing and selling "cheap goods" from Vermont, which would tend to displace New York milk in the market until its cost was reduced. In the instant case, the barrier is an effort to maintain the wealth of domestic producers by preventing dealers from exporting and selling the milk at a low price and thus disabling themselves from paying high prices to producers. In each case, the "state legislation nominally of local concern * * * by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell* v. *North Carolina*, 187 U. S. 622, 626." *South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 185–186. And wherever the effort is thus to gain a local economic benefit by erecting a barrier to the flow of goods, the statute is invalid,

whether the commerce seeks to flow into or out of the State. Compare *Baldwin* v. *Seelig, supra,* and *Edwards* v. *California,* 314 U. S. 160, 173–174, with *Foster Packing Co.* v. *Haydel,* 278 U. S. 1; and *Pennsylvania* v. *West Virginia,* 262 U. S. 553. This is true even where intrastate commerce is subject to like regulation, as indeed it was in *Baldwin* v. *Seelig, supra.* Cf. *State Board* v. *Young's Market Co.,* 299 U. S. 59, 62; *Case of the State Freight Tax,* 15 Wall. 232, 274, 277.

We do not overlook the fact that the California legislature regarded the statute as a measure for protecting the public health. An argument based upon such considerations was made by New York and rejected in *Baldwin* v. *Seelig, supra.* In that case it could be said, on behalf of the State, not only that the price received by New York farmers must be protected against competition in order to protect the supply of pure milk (pp. 522–523), but also that the price received by the Vermont farmer directly affected the wholesomeness of his product (pp. 522–526). Here the second branch of the argument cannot be made at all. And the effect on the income of California producers of sales in the federal enclave at a competitive price is certainly more remote than the effect upon the New York farmer of the availability of cheaper milk in Vermont. In California the danger is said to be that California dealers will so impoverish themselves by selling milk at too low a price on federal

enclaves as to disable themselves complying with the State law fixing the price which they must pay to producers for the milk (R. 35). It has been the judgment of Congress [16] and of the Department of Agriculture [17] that milk prices can be fixed and enforced at the producer level alone. But whatever the danger, it does not justify California in dealing with a local problem which is at first economic, and only indirectly a matter of public health, by seeking to "neutralize the economic consequences of free trade among the States". *Baldwin* v. *Seelig, supra,* p. 525.

CONCLUSION

The order of the Supreme Court of California denying petition for a writ of mandamus was final and appealable under Section 237 of the Judicial Code. The California Milk Control Act attempts to regulate the price to be paid by the United States for milk purchased for the armed forces; its legal incidence is on the United States. As thus applied, it is invalid both because the States have no power directly to regulate the procurement activities of the Federal Government and because the

[16] See Section 8c of the Agricultural Adjustment Act of 1933 as amended and reenacted by the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246.

[17] See for examples the milk marketing orders involved in *United States* v. *Rock Royal Co-operative*, 307 U. S. 533 (New York); *H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588 (Boston); *United States* v. *Wrightwood Dairy*, 315 U. S. 110 (Chicago).

statute is inconsistent with Acts of Congress establishing a federal procurement policy. Moreover, as applied to sales on Moffett Field, the statute is unconstitutional for two additional reasons: California has no power to fix the price at which milk is sold on Moffett Field either directly or indirectly by prohibiting milk dealers from handling in California milk which is later sold on Moffett Field at a price below that fixed by California. Second, California may not constitutionally erect a barrier to the flow of commerce into territory subject to the exclusive jurisdiction of the United States for the purpose of fixing the price at which the goods are sold in that territory.

Respectfully submitted,

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JANUARY 1943.

APPENDIX

The pertinent provisions of the California Milk Control Act (Cal. Agric. Code (Deering, 1937) Division 4, c. 10, §§ 735–738, as amended Cal. Agric. Code (Deering, 1941 supp.) pp. 462–474) are as follows:

§ 735.3. Definitions. As used in this chapter:

* * * * *

(f) *"Distributor"* means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations. The definition of "distributer" shall not include any of the following: (1) Any retail store that is not engaged in processing and packaging fluid milk or fluid cream, (2) any establishment where fluid milk or fluid cream is sold only for consumption on the premises, that is not engaged in processing and packaging fluid milk or fluid cream, (3) any person owned or controlled by one or more retail stores, or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream, (4) any producer who delivers fluid milk or fluid cream only to a distributor.

* * * * *

(g) *"Retail store"* means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

* * * * *

(j) *"Consumer"* means any person who purchases fluid milk, fluid cream or dairy products for consumption.

* * * * *

§ 736.3. Requisites of plan: Optional provisions: Sales stimulation programs. Any stabilization and marketing plan shall contain the following provisions:

(a) *Unfair practices.* Provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

* * * * *

(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

(7) The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices

established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

(8) The purchasing or receiving of any fluid milk or fluid cream by distributors from producers within a marketing area wherein a stabilization and marketing plan is in effect for less than the minimum prices established in such plan, regardless of whether such milk or cream is subsequently sold or distributed within or without such marketing area, or within or without the jurisdiction of the State of California; provided, however, that if such fluid milk or fluid cream is subsequently sold or distributed in another marketing area within the State of California where a stabilization and marketing plan is in effect, then the distributor shall pay the producer thereof not less than the minimum prices established in such plan in the marketing area wherein such milk or cream is sold or distributed; and provided further, that in the event such fluid milk or fluid cream is subsequently sold or distributed in any place within the jurisdiction of the State of California where no stabilization and marketing plan is in effect, then such milk or cream may be paid for by the distributor to the producer thereof at not less than the average price paid by distributors to producers for milk or cream of similar grade and quality at the plants in the vicinity where such milk or cream is so sold or distributed, as such prices are determined by the director from contracts required to be filed with him pursuant to this section.

* * * * * *

§ 736.11. Designation of prices in marketing areas. The director shall, as soon as possible after the effective date hereof, in all

marketing areas wherein a stabilization and marketing plan is in effect under the provisions of this chapter, designate and prescribe or provide methods for designating and prescribing,

(a) *Minimum wholesale prices* which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor; and

(b) *Minimum retail prices* which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

* * * * *

§ 736.13. Sales at less than established prices: Discounts, etc., prohibited: Schedules of prices: Filing: Presumption: Conditional offers and agreements: Meeting filed prices. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article, and the use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store,

restaurant, confectionery or other place for consumption on the premises, or consumer or any retail store, restaurant, confectionery or other place for consumption on the premises, buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, whether by discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift, or otherwise and whether any such discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift applies directly to fluid milk or fluid cream or is allowed upon or in connection with the sale or handling of any other commodity or product, is hereby prohibited. * * *

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 275.

PACIFIC COAST DAIRY, INC., a corporation,

Appellant,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; WILLIAM J. CECIL, Director of Agriculture of the State of California; BUREAU OF MARKET ENFORCEMENT OF THE STATE OF CALIFORNIA; C. J. CAREY, Chief; E. E. BROWN, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California,

Appellees.

PETITION FOR REHEARING.

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SUBJECT INDEX.

	PAGE
Decision	1
Import of decision	3
Effect on health standards	4
Doctrine of Osborn v. Ozlin	7
Exclusive jurisdiction	9
United States v. Press Publishing Co.	14
Conclusion	17
Certificate of counsel	18
Addenda	19

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Alaska Packers Assn. v. Commission, 294 U. S. 532	7
Buffington v. Day, 78 U. S. (11 Wall.) 113, 20 L. Ed. 122	9
Hoopeston Canning Co. v. Pink, No. 358, October, 1942, Term, decided March 1, 1943	8, 15, 16
Osborn v. Ozlin, 310 U. S. 53	7, 8, 9, 10, 11, 13, 15
Penn Dairies, Inc. v. Milk Control Commission, No. 399, October Term, 1942	2, 3, 12, 14
People of Puerto Rico v. Shell Company, 302 U. S. 253, 58 S. Ct. 167, 82 L. Ed. 235	15
Stewart & Co. v. Sadracula, 309 U. S. 94	11
United States v. Oklahoma Gas & Elec. Co., 297 Fed. 575	7
United States v. Press Publishing Co., 219 U. S. 1, 31 S. Ct. 212, 55 L. Ed. 65	14, 15, 17

STATUTES.

Agricultural Code, Sec. 472	4
Agricultural Code, Sec. 642	5
Agricultural Code, Sec. 736.3(a)(6)	13
Agricultural Code, Sec. 736.3(a)(7)	13
Agricultural Code, Sec. 736.3(a)(8)	13
Constitution, Art. I, Sec. 8, Clause 17	10

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Appellees.

PETITION FOR REHEARING.

Come now the above named appellees and present this their petition for a rehearing of the above entitled cause and in support thereof respectfully show:

Decision.

The State of California prohibits its licensed milk distributors from purchasing from producers, and from processing, bottling and handling in designated marketing areas in the State any milk that is sold or is to be sold

below the State's prescribed minimum prices. Violation is made a ground for action against the distributor's license.

On March 1, 1943, the Supreme Court of the United States, in an opinion handed down by Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Murphey dissenting, decided that the State of California cannot constitutionally take any action against its licensed distributors for violation of this provision in those instances where the sale is made by the distributor to the Federal Government upon a Federal enclave within the State. The decision would apply to the same extent if the sale were made to any party within such a Federal enclave.

The decision in this case necessarily hinges upon a differentiation drawn between sales made to the Federal Government within the geographical boundaries of the State upon land, the jurisdiction over which has been ceded by the State to the Federal Government, and upon land over which the State retains its jurisdiction. Otherwise, the decision rendered the same day in *Penn Dairies, Inc. v. Milk Control Commission*, No. 399, October Term, 1942, would govern.

At the outset we are strengthened by the fact that some members of this Court who supported the majority opinion herein and dissented in the *Penn Dairies* case, *supra*, concurred wholeheartedly in the equity of the State's position, as witness the statement of Mr. Justice Black to counsel for the State at the time of the oral argument:

> "I can see a very strong argument that the Army should not do this. I think most anyone can recognize the force of the argument you make,—that this is not right to go on and buy cheaper milk, cheaper than the regular price of the State."

Unfortunately, in the California case the argument was directed by the Court almost wholly and simply to the principle of sales made to the Federal Government, which was the sole question for the following argument in the *Penn Dairies* case. While, in the California case the only question in contradistinction to the ruling in the *Penn Dairies* case—that of a possible determining factor of Federal enclave—was not discussed or argued.

Import of Decision.

We feel that this Court has not appreciated the full import of its decision in this case. There are literally hundreds of these Federal areas within California where milk may now be sold without regard to price. There are actually hundreds of thousands of our armed forces, as well as thousands of civilians, in these Federal areas who by this decision will be subjected to a milk supply which may now be sold at those cut-throat below-cost prices which the Federal as well as State governments have both long ere this recognized as resulting in the scourges of typhoid and onslaughts of tuberculosis which have so devastated and crippled humanity in the not yet dim ignorant past.

And shall we now for the sake of a technical priority sacrifice the finest of our young manhood who are so valiantly rendering up their young bodies to our complete disposal that we may all live in the ideals which have become an integral part of America to the nefarious machinations of traffickers to whom intestinal bacilli and their murderous kin are but one with the daisies of the fields?

Without doubt every state in the Union will be vitally affected, for, by the same token, all of those health and

sanitary regulatory standards, not only for milk but for the numerous other commodities where the punishable offense consists of the combined elements of preparation and sale, are rendered hopelessly innocuous if the sales take place on Federal enclaves, the teeming spots of humanity which should be doubly and ably protected against all *preventable* suffering and even disabling in preparation for the possible supreme sacrifice yet to come.

Enforcement of these standards is to a large degree tied up with sales.

For example, the enforcement provision of the market milk standards in California is found in Sec. 472 of the Agricultural Code, which makes it "unlawful to sell, purchase, or use as market milk, * * * milk * * * which does not meet the requirements and standards of market milk * * *." Production or possession of impure or contaminated milk is not of itself, alone, punishable.

When all sales of market milk within the State were deemed subject to this provision and distributors knew that violation of such standards meant loss of license, these standards could be efficiently policed by inspection of the dairies and of the milk plants.

Effect on Health Standards.

However, with a vast and growing market within the State now freed from these regulations and not subject to these standards, producers and distributors alike are immune from punishment and may produce and distribute whatever impure, contaminated and dirt infested milk that they can get by with, restrained only by such federal inspection as may be provided and whatever damage may be

suffered consequent upon violation of their federal contracts.

Moreover, the danger of contamination and infection to the entire milk supply of the State arising from this uncontrolled and unregulated milk production and distribution is fraught with too dire possibilities to be permitted without fully exploring every legal concept in an effort to prevent the same.

Another section, 642 of the Agricultural Code, provides that:

> "It is unlawful to sell, give away, deliver, or to knowingly purchase or receive any milk, goat's milk, sheep's milk or product thereof which has been produced in or by a dairy farm or milk products' plant in an insanitary condition ('insanitary condition' being defined elsewhere in the code) or that is handled by any carrier of milk or products thereof or in any store or depot that is in an insanitary condition; or that is produced from animals affected by any disease, except as hereinafter provided."

But suppose the contract is entered into and the sale and delivery of milk or milk products in violation of that section take place on federal ceded territory. Under the quoted section it is the *sale* and *delivery* that constitutes the unlawful act. Under the decision in the instant case, California would be powerless to punish that act or to revoke a distributor's license for such violation, because the sale, occurring on federal territory, was there lawful

Similar examples might be cited, applying in the same manner to numerous fruit and vegetable standards and regulations.

We submit that every State has and should have the power to reach such a situation. The purpose is not, as stated in the opinion of the Court, to punish citizens for doing in federal territory what by the law of the United States is there lawful. The true purpose is wholly to the contrary. It is to protect the health and welfare of its own citizens. And that protection the Federal Government has relied upon and should now rely upon. In this case the fact that the milk was sold to the United States and that it was sold on ceded territory were mere incidents. The destination of that milk and the identity of that buyer were indifferent circumstances wholly incidental to the transaction.

The entire California program of health, sanitation and stability of the milk supply will not only be dangerously undermined in the State as a whole, but will be completely lost to occupants of the Federal areas within California's boundaries.

To afford protection, Congress would be forced to legislate on these myriad local requirements and to supply inspection and enforcement at these hundreds or thousands of Federal areas. *Since the inception of our government Congress has left this to the several States and relied upon them for its protection.*

So far as our inquiry has progressed, in every single instance the furnishing of public utilities, such as water, light, power, gas, transportation, etc., to Federal areas within a State has been completely governed by the rates and regulations of the State body entrusted with public utilities administration. In the single instance where this State authority appears to have been questioned a Federal court upheld the State power, although the text does not

disclose whether the Federal area was ceded territory or not,—a distinction which the court *then* apparently deemed unimportant. *United States v. Oklahoma Gas & Elec. Co.*, 297 Fed. 575.

Doctrine of Osborn v. Ozlin.

In the instant opinion this Court says:

> "The court below points out that the statute regulates only the conduct of California's citizens within its own territory; that it is the purchasing, handling, and processing by the appellant in California of milk to be sold below the fixed price—not the sale on Moffett Field—which is prohibited, and entails the penalties prescribed by the statute. And reliance is placed upon the settled doctrine that a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders."

The decision recognizes the "settled doctrine that a State is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders." (*Alaska Packers Assn. v. Commission*, 294 U. S. 532, 541; *Osborn v. Ozlin*, 310 U. S. 53, 62-63.)

This settled principle is met, however, with the simple statement, unamplified by discussion or supported by precedent, that such doctrine is without application here because of the authority granted the Federal Government over Moffett Field.

This conclusion would appear to be necessarily based on a holding that the sovereignty of the United States over a Federal enclave as related to the State in which it

lies is more complete than is the sovereignty of a State over its own territory as related to a sister State.

In *Osborn v. Ozlin, supra*, Virginia provided that insurance companies licensed to do business in that State should not make contracts of insurance on persons or property within the State except through resident agents therein who could not share more than one-half of the commission with a non-resident agent. Violation was made a ground for suspension or revocation of the license to do business in Virginia. (To same effect, see *Hoopeston Canning Co. v. Pink*, No. 358 October, 1942, Term, decided March 1, 1943.)

The contract made by the insurance company in the State of New York insuring property in Virginia and paying to the agent in New York who produced the business the full commission was just as valid a contract as was the contract in the instant case between the distributor and the Federal Government to furnish the milk at Moffett Field.

This Court in the *Ozlin* case, however, upheld the Virginia regulation, and said:

> "Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed."

California has not sought to prohibit the making of milk contracts in Moffett Field or in other Federal enclaves within the State. She, likewise, merely claims that her interest in protecting the health and welfare of her citizens warrants the kind of control she has here imposed.

Certainly the maintenance and protection of an adequate and of a pure and wholesome supply of milk is far more essential to the interest of the State (and of the Federal Government as well) than is "minimizing the risks of casualty and loss" in insurance.

Exclusive Jurisdiction.

While unquestionably the jurisdiction of the Federal Government in such "ceded" enclaves as Moffet Field is exclusive, the "exclusiveness" of that jurisdiction is no greater nor more potent than the jurisdiction of the State within its sphere.

Federal jurisdiction in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or as expressed by the Tenth Amendment "reserved," should be as independent of the general government as that government within its sphere is independent of the states. (*Buffington v. Day*, 78 U. S. (11 Wall.) 113, 124, 20 L. Ed. 122.)

It is not apparent what greater sanctity attaches to the validity of a contract made in compliance with the Federal laws on Moffett Field because of Federal jurisdiction, than attaches to the validity of a contract made in compliance with the laws of New York because of the jurisdiction of that State.

Yet this Court reached the conclusion in the *Oslin* case, *supra*, that the State of Virginia might revoke the license of an insurance company for making a contract in New York to pay the full commission to a resident New York agent on insurance covering Virginia property because such a contract violated the Virginia statute.

On the other hand, in the instant case it is held that California may not take measures affecting one of its licensed distributors for violations of a California statute, because one of the component elements of the violation, to-wit, the sale, took place on Moffett Field, a Federal enclave situate within the boundaries of California.

Under these insurance decisions it cannot be doubted that if the transactions occurred even in a foreign country the State legislation would still be valid as applied to the activities within the State which enacted the laws. For example, if the *Ozlin* case had involved a contract of insurance effected in Canada, the result clearly, under the reasoning of the Court would have been the same.

Nevertheless, in the case at bar this Court has held that in a similar situation where the acts which constitute an essential element in the violation occur within a Federal enclave, "exclusive jurisdiction" of the United States wholly defeats the power of the State over the acts of its own citizens committed within the State—and this in a situation where the legislation is enacted pursuant to the police power of the State in its most fundamental sense, for the protection of the life and health of its inhabitants and also of the occupants of the Federal areas.

We believe that this reasoning is incompatible with this Court's construction of Article I, Section 8, Clause 17, of the Constitution providing that the United States shall have power to exercise "exclusive legislation" over Fed-

eral areas. From the beginning this Court has held that the Federal sovereignty over such areas is far more circumscribed than is the sovereignty of a State over the territory within its jurisdiction—which was involved in the *Ozlin* and other similar cases. Thus the Court has held that the laws of the State in effect at the date of cession shall continue in effect. (*Stewart & Co. v. Sadraçula*, 309 U. S. 94.) Many other exceptions have been announced (see dissenting opinion of Mr. Justice Frankfurter herein). It is clear, we submit, that regardless of the scope of the "exclusive" jurisdiction which is exercised by Congress over such areas, such jurisdiction is not *more* "exclusive" than that of a sovereign State over *its* territory and citizens.

If the principles of the *Ozlin* case be not adopted as controlling here, then it seems clear that in the interests of the public welfare this Court should hold, as it has held generally in its decisions under the Commerce clause, that the laws of the states enacted in the exercise of the police power in matters of local concern may apply to Federal areas in the absence of contrary Federal legislation. As this Court has held in its decisions under the Commerce clause, this would not deny the exclusive jurisdiction of the United States, for it would have plenary power to enact any legislation at any time, but it would not leave a hiatus in the laws of the Federal areas so that the *very chaotic and dangerous situation now threatening consumers of milk in California (within, as well as without, Federal enclaves) could occur.*

Too much emphasis has been placed, we believe, on the bare, legal aspects of the sale and too little upon the real objectives of the statute. Because of the approach

to the case, companion as it was to the *Penn Dairies* case, from the standpoint of whether or not Congress had affirmatively enacted legislation inconsistent with the California law, the case appears to have been considered almost wholly from the standpoint of an assumption that the only provisions of the law involved are those relating to the sale at a given price. Collateral to this is the assumption that all of the provisions of the State law protecting the supply of milk, its sanitation, its bacterial count, its freedom from tuberculosis and undulant fever, *etc.*, are safeguards still enjoyed by the Army at the lesser price. As a matter of fact, the health provisions of the law stand on exactly the same basis as the price provisions. If these regulations, contingent upon price maintenance fall, because the sale is made upon Federal territory, then all other health regulations, the violation of which are contingent upon a sale, *must likewise fall.*

The decision finds "that the true purpose (of the California statute) was to punish California's own citizens for doing in exclusively Federal territory what by the law of the United States was there lawful." The same statement could be made equally applicable to the Virginia insurance statute above mentioned, where, in that instance, the contract to pay the full commission to the non-resident broker was made in New York.

It is said that this purpose was to be accomplished "under the guise of penalizing preparatory conduct occurring in the state."

We cannot agree that the purpose of this statute was, as the Court indicates, solely to control the price of milk in this Federal area. In fact, the State has consistently repudiated all intent and power to foist its minimum milk price structure into such Federal territory; but it has just as consistently sought to protect the milk supply by insisting that its licensed milk distributors obtain an adequate minimum price for such milk as they handle under their licensed operations in California. The provision of the statute here in question (736.3(a) (6) Agricultural Code) does not apply directly nor exclusively to Federal territory. An examination of this subsection, together with subsections (7) and (8) [See Appendix A to Brief of Appellees, p. 14 on file herein] following the same, demontrates beyond question that this is only part of a comprehensive plan to insure the protection and maintenance of an adequate supply of pure and wholesome milk by means of preventing the utilization of California's milk production by its distributors unless they obtain for the same an established minimum price which the State has found to be *necessary for that purpose*. Where, or to whom, the sale is made is purely incidental. The obtaining of the necessary minimum price is the essential requisite. The fact that the contract was made and the title passed presumably on Federal territory should not defeat this salutary purpose any more so than did the fact in the *Ozlin* case that the contract was made in the State of New York.

United States v. Press Publishing Co.

Nowhere in the opinion is any reference made to the case of *United States v. Press Publishing Co.*, 219 U. S. 1 (1911), 31 S. Ct. 212, 55 L. Ed. 65, cited by counsel in the *Penn Dairies* case, *supra*.

The opinion in the instant case discloses that the decision rests wholly upon the fact that the sale by the licensed distributor below the established minimum price was considered by the Court to be the essential element of the offense. And because this sale occurred in Federal territory, the Court concluded that the State could not punish because such sale was not in violation of any Federal law.

In the *Press Publishing Co.* case, a directly contrary conclusion on facts precisely similar in principle to those here involved was reached by the Court. There, the offense was libel. The utterance and publication took place at the United States Post Office in New York and the West Point Military Reservation, both of which are Federal enclaves over which the Federal jurisdiction is just as exclusive as that over Moffett Field. Just as the instant sale violates no Federal law, so, there, the utterance or publication of the libel violated no Federal law.

In the *Press Publishing Co.* case it was held that the State of New York had the power to punish a libel consummated upon Federal enclaves (the Post Office at New York and the West Point Military Reservation over which the Federal government had exclusive jurisdiction) where the preliminary acts of assembling the material and doing

the printing, one of the elements of the offense, took place in the State of New York and under its jurisdiction. In the present case, the purchasing, handling and processing of the milk, one of the elements of the offense, took place in California, just as the purchasing of the paper, arranging of the material, and the printing of the libelous matter took place in New York in the *Press Publishing* case. In the present instance, only the sale, the final element of the offense, took place in the Federal enclave, just as in the *Press Publishing* case the publication of the libelous matter, the final element of the offense, took place in the Federal enclave. In the instant case, it required the sale and delivery (in this instance on the Federal territory) to complete the offense, just as in the *Press Publishing* case it required the publication (also on the Federal enclave) to complete the libel.

The authority of the *Press Publishing* case has never been questioned and it was cited with approval by this Court in *People of Puerto Rico v. Shell Company*, 302 U. S. 253, 266, 58 S. Ct. 167, 173, 82 L. Ed. 235:

The language used by this Court in deciding the *Hoopston Canning Co.* case the same day it decided the instant case is peculiarly applicable here.

In the *Hoopston Canning* case, following the doctrine of the *Ozlin* case, the Court said:

> "In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by *conceptualistic discussion* of theories of the place of contracting or of performance: More recently it has been recognized that a state may have substantial interests in the business of insurance of its people

> or property regardless of these isolated factors. This interest may be measured by highly *realistic considerations* such as the protection of the citizen insured or the protection of the state from the incidents of loss. * * *" (Emphasis added.)

Surely the interest that the State (and the Federal government, as well) has in an adequate, pure and wholesome milk supply for its people is far more substantial and vital than its interest in the business of insurance of its people or property.

Apparently we are left with no alternative other than to glean from these two decisions (*Pacific Coast Dairy* and *Hoopston Canning Co.* cases) that the Court will follow a *conceptualistic* approach when relations between the State and Federal governments are involved. Then, "the niceties of the law of sales and contracts" and the passing of title and terms of cession and the degree of "exclusiveness" of jurisdiction must be weighed, while men, women and children, both within the State and within the Federal areas, are exposed to the dangers of impure and unwholesome milk, as well as a shortage of fresh milk.

But in the relation between a State and private parties the protection of the financial interest involved may be approached from such a *realistic* viewpoint as to allow the State to protect *these interests* to the point of regulating what its licensees may *not* do in other states, even if perfectly valid under the laws of such other states.

We attach hereto as an addenda, in accordance with the instructions and under the authority of the Attorneys General of the States named, the request of a majority of the States of the Union that a rehearing of this cause be granted.

Conclusion.

We believe that the tremendous import of this decision, which appears to be one of first impression; its vital and far-reaching effect in so many of our States; its divergence from the result reached relating to extraterritorial state control over insurance, a matter of far less moment; its apparent departure from the principles of the *Press Publishing* case; and the confusion and practical conflict possible in adjoining military reservations in the price and purity of milk supplied, dependent wholly upon the title and terms of cession of the military site, justly warrant a further consideration of this case by a full Court.

And we present this petition in the hope that this high Court may be able to find it within its power to reconcile the legal requirements to the health exigencies, thus enabling all of these States to hold together their humanitarian regulations, so hardly gained, and as a final protection to the vastly increasing Federal enclaves filled with their myriad youth, no longer under the protection of their home states.

Respectfully submitted,

ROBERT W. KENNY,
Attorney General of the State of California;
W. R. AUGUSTINE,
WALTER L. BOWERS,
Deputies Attorney General,
Counsel for Appellees.

I, Walter L. Bowers, counsel for the above-named appellees, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WALTER L. BOWERS,
Counsel for Appellees.

Addenda.

The following named States by their respective Attorneys General hereby join in respectfully requesting and earnestly urging that a rehearing be granted in the within entitled case of *Pacific Coast Dairy Co. v. Department of Agriculture et al.*

State of Alabama:
William N. McQueen, Acting Attorney General.

State of Arizona:
Joseph W. Conway, Attorney General.

State of Arkansas:
Guy E. Williams, Attorney General.

State of Colorado:
Gail L. Ireland, Attorney General.

State of Connecticut:
Francis A. Pallotti, Attorney General.

State of Delaware:
Clair J. Killoran, Attorney General.

State of Florida:
J. Tom Watson, Attorney General.

State of Georgia:
T. Grady Head, Attorney General.

State of Idaho:
Bert H. Miller, Attorney General.

State of Iowa:
John M. Rankin, Attorney General.

State of Kentucky:
Hubert Meredith, Attorney General.
M. B. Holifield, First Assistant Attorney General.

State of Louisiana:
Eugene Stanley, Attorney General.

State of Maine:
Frank I. Cowan, Attorney General.

State of Maryland:
William C. Walsh, Attorney General.

State of Missouri:
Roy McKittrick, Attorney General.

State of Minnesota:
J. A. A. Burnquist, Attorney General.

State of Montana:
R. V. Bottomly, Attorney General.

State of New Mexico:
Edward P. Chase, Attorney General.

State of Nevada:
Alan H. Bible, Attorney General.

State of New Hampshire:
Stephen M. Wheeler, Acting Attorney General.

State of North Carolina:
Harry McMullan, Attorney General.

State of North Dakota:
Alvin C. Strutz, Attorney General.

State of Oregon:
I. H. Van Winkle, Attorney General.

State of South Dakota:
George T. Mickelson, Attorney General.

State of Utah:
Grover A. Giles, Attorney General.

State of Vermont:

Alban J. Parker, Attorney General.

State of Washington:

Smith Troy, Attorney General.

Fred E. Lewis, Acting Attorney General.

State of West Virginia:

Ira J. Partlow, Acting Attorney General.

State of Wyoming:

Louis J. Omarr, Attorney General.

pp. 1, 2, 3, 5 + 6 dissent

SUPREME COURT OF THE UNITED STATES.

No. 275.—October Term, 1942.

Pacific Coast Dairy, Inc., Appellant, vs. Department of Agriculture of California et al. } Appeal from the Supreme Court of California.

[March 1, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

The appellant challenges a judgment of the Supreme Court of California[1] dismissing a writ of alternative mandamus and denying a permanent writ to prevent the Department of Agriculture of the State from conducting a proceeding to revoke its license as a distributor of milk. The court, in denying relief, overruled several contentions, based upon the federal Constitution, which are here renewed.

Chapter 10 of the Agricultural Code of California[2] provides a plan for the "stabilization and marketing of fluid milk and fluid cream". It declares their production and distribution a business affected with a public interest, and the regulation of the business an exercise of the police power; states that existing unjust, unfair, destructive and demoralizing practices menace the health and welfare of the people, despite sanitary regulations; and that it is necessary to promote intelligent production and orderly marketing by eliminating the evil practices existing in the industry.

The law empowers the Director of Agriculture to license distributors and to establish marketing areas within which uniform prices and regulations for the sale of milk shall prevail.

The appellant was a licensed distributor doing business in the Santa Clara County marketing area, in which there were in effect a

[1] 19 Cal. 2d 818; 123 P. 2d 442.

[2] Deering, 1937, Div. 4, c. 10, §§ 735-738, as amended, Deering, 1941 Supp., pp. 462-467.

stabilization and marketing plan and schedules of minimum wholesale and retail prices. It entered into a contract with the War Department of the United States, signed by the Quartermaster's Department of Moffett Field, to sell milk to the Department at Moffett Field, which lies within the boundaries of the Santa Clara County marketing area, at less than the minimum price fixed for the area. Sales and deliveries under the contract took place on Moffett Field.

A complaint was filed with the Department of Agriculture charging the appellant violated § 736.3(a)(6) of the Code which provides that an unfair practice, warranting revocation of license or prosecution is:

"The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

This section did not appear in the Code until 1941,[3] when it was added as an amendment. California recognized its lack of power to fix retail prices for milk sold within federal enclaves located in the State.[4] But the legislature desired to accomplish this. In 1941 it memorialized Congress, requesting passage of a federal law requiring purchasing officers of the armed services purchasing food supplies for troops or agencies of the United States located in the State to refuse bids for milk at prices below those fixed under the California Milk Stabilization Law or amendments thereof.[5] The memorial was referred to the Committee on Agriculture of the House and to the Committee on Agriculture and Forestry of the Senate,[6] but was never acted upon by either committee. Congress having failed to act, Section 736.3(a)(6) and others were added to the Code, July 16, 1941, for the purpose of reaching sales on federally owned lands.

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[3] Cal. Stats. 1941, Chap. 1214; p. 3008.

[4] Opinions of California Atty.-Gen. N. S. 1905, N. S. 1950 [1939]; Consolidated Milk Producers v. Parker, 19 Cal. 2d 815; 123 Pac. 2d 440; cf. Standard Oil Co. v. California, 291 U. S. 242.

[5] Cal. Stats. 1941, Chap. 65, p. 3402.

[6] 87 Cong. Rec., Part 5, 5644, 5698.

Moffett Field was acquired by the United States under an Act of Congress,[7] and it is conceded that it has always been under the exclusive jurisdiction of the federal government.[8]

The appellant sought a writ of mandamus from the court below to restrain the Department of Agriculture from proceeding to hear and act upon the pending complaint. An alternative writ issued. After return by the appellees, setting up only that the complaint failed to state facts sufficient to constitute a cause of action, the court discharged the alternative writ and denied a peremptory writ. The facts we have recited appear in the petition for the writ or are matters of which the court below and this court take judicial notice.

The Supreme Court of California overruled the appellant's contentions that the State's conceded control of activities within its jurisdiction gave it no authority to penalize transactions occuring on Moffett Field; that the State law violates the commerce clause of Article I, § 8 of the federal Constitution; that it runs afoul of congressional action embodied in the federal Agricultural Marketing Agreement Act,[9] and that it unlawfully burdens a federal instrumentality. We find it necessary to consider only the contention first stated.

The exclusive character of the jurisdiction of the United States on Moffett Field is conceded. Article I, § 8, clause 17 of the Constitution of the United States declares the Congress shall have power "To exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, "and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;" . . .

When the federal government acquired the tract, local law not inconsistent with federal policy remained in force until altered by national legislation.[10] The state statute involved was adopted

[7] Act of February 12, 1931, c. 122, 46 Stat. 1092. This act provides that the tract which is now called Moffett Field shall be accepted by the United States without cost to the government. The petition for mandamus alleges that, more than fifteen years ago, Moffett Field "was purchased by the Government of the United States for erecting forts, magazines, arsenals, dock-yards and other needful buildings." . . . The appellant and the Government treat this allegation as conclusive, since it was not denied by the appellees. Nothing turns, in our view, on the method of acquisition.

[8] See Cal. Stats. 1897, p. 51; Political Code of California, § 34; U. S. Constitution, Art. I, § 8, clause 17.

[9] 50 Stat. 246, 7 U. S. C. 608c.

[10] Stewart & Co. v. Sadrakula, 309 U. S. 94, 99.

long after the transfer of sovereignty and was without force in the enclave. It follows that contracts to sell and sales consummated within the enclave cannot be regulated by the California law. To hold otherwise would be to affirm that California may ignore the Constitutional provision that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land;" . . .[11] It would be a denial of the federal power "to exercise exclusive Legislation."[12] As respects such federal territory Congress has the combined powers of a general and a state government.[13]

The answer of the State and of the court below is one of confession and avoidance,—confession that the law in fact operates to affect action by the appellant within federal territory, but avoidance of the conclusion of invalidity by the assertion that the law in essence is the regulation of conduct wholly within the State's jurisdiction.

The court below points out that the statute regulates only the conduct of California's citizens within its own territory; that it is the purchasing, handling, and processing by the appellant in California of milk to be sold below the fixed price—not the sale on Moffett Field—which is prohibited, and entails the penalties prescribed by the statute. And reliance is placed upon the settled doctrine that a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders.[14] We think, however, that it is without application here, because of the authority granted the Federal Government over Moffett Field.

In the light of the history of the legislation, we are constrained to find that the true purpose was to punish California's own citizens for doing in exclusively federal territory what by the law of the United States was there lawful, under the guise of penalizing preparatory conduct occurring in the State,—to punish the appellant for a transaction carried on under sovereignty conferred by Art. I, § 8, clause 17 of the Constitution, and under authority superior to that of California by virtue of the supremacy clause.

We have this day held in *Penn Dairies, Inc.* v. *Milk Control Commission*, No. 399, that a different decision is required where

[11] Art. VI, clause 2.

[12] James v. Dravo Contracting Co., 302 U. S. 134, 141.

[13] Stoutenburgh v. Hennick, 129 U. S. 141, 147.

[14] Alaska Packers Assn. v. Commission, 294 U. S. 532, 541; Osborn v. Ozlin, 310 U. S. 53, 62-63.

the contract and the sales occur within a state's jurisdiction, absent specific national legislation excluding the operation of the state's regulatory laws. The conclusions may seem contradictory; but in preserving the balance between national and state power, seemingly inconsequential differences often require diverse results. This must be so, if we are to accord to various provisions of fundamental law their natural effect in the circumstances disclosed. So to do is not to make subtle or technical distinctions or to deal in legal refinements. Here we are bound to respect the relevant constitutional provision with respect to the exclusive power of Congress over federal lands. As Congress may, if it find the national interest so requires, override the State milk law of Pennsylvania as respects purchases for the Army, so it may, if not inimical to the same interest subject its purchasing officers on Moffett Field to the restrictions of the milk law of California. Until it speaks we should enforce the limits of power imposed by the provisions of the fundamental law.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice JACKSON.

While we have joined in the opinion of the Court, we are also of the view that the judgment below should be reversed for the additional reason set forth in the dissenting opinion in *Penn Dairies, Inc.* v. *Milk Control Commission*, No. 399, decided this day.

SUPREME COURT OF THE UNITED STATES.

No. 275.—October Term, 1942.

Pacific Coast Dairy, Inc., Appellant, *vs.* Department of Agriculture of the State of California, et al. } Appeal from the Supreme Court of the State of California.

[March 1, 1943.]

Mr. Justice Frankfurter, dissenting.

Both Pennsylvania and California, as part of their control over the supply and distribution of milk for the needs of their people, regulate the prices at which milk may be sold within the state. In both states, more particularly at Indiantown Gap Military Reservation, Pennsylvania, and at Moffet Field, California, units of the United States Army are stationed. At each of these sites the contracting officer, a junior officer in the Quartermaster Corps, invites bids for the sale of milk to the Army. Are these two contracting officers authorized under existing federal law to accept bids that undercut the prices fixed by Pennsylvania and California for the supply of milk within their borders and thereby dislocate, in part at least, the regulatory systems established by the two states?

In No. 399, *Penn Dairies, Inc.*, v. *Milk Control Commission of Pennsylvania*, Penn Dairies, a milk dealer of Lancaster, Pennsylvania, supplied milk for the use of the Army at Indiantown Gap Military Reservation. Their sales were the result of successful bidding at prices below the minima fixed by the Pennsylvania Milk Control Law. Subsequently, when Penn Dairies applied for renewal of its license to do business under state law, the Pennsylvania Milk Control Commission denied the application on the ground that the sales to the Army were not immune from the minimum price provisions of the Pennsylvania law. The Pennsylvania Supreme Court sustained this determination. In this case, No. 275, *Pacific Coast Dairy, Inc.*, v. *Department of Agriculture of California*, Pacific Coast Dairy, a milk dealer of San Francisco, California, supplied milk for the use of the Army at Moffet Field, about thirty-five miles

from San Francisco. Their sales, too, were the result of successful bidding at prices below those fixed by California law. For thus departing from the price provisions of the state law under which it was licensed to do business, the California Department of Agriculture instituted proceedings to revoke Pacific Coast Dairy's license. To stay these proceedings the dairy sought a writ of mandamus, which was denied by the Supreme Court of California.

In my view, the Court in upholding the refusal by Pennsylvania to renew a license because of an arrangement made on behalf of the Government must imply that the contracting officer of the Indiantown Military Gap Reservation was not authorized to accept bids below the minimum price requriements set by Pennsylvania for the sale of milk within the state. In the California case, however, the Court holds that the contracting officer for Moffet Field may, in the case of sales and deliveries made on Moffet Field, contract at prices below those fixed by California for the sale of milk within its borders. Opposite legal results are thus reached for precisely the same practical situations. The justification for this incongruity in defining the scope of the authority of the two contracting officers is attributed to the difference in the nature of the Government's proprietary interest in each of the two Army sites. Indiantown Gap Military Reservation is held by the United States under lease from the Commonwealth of Pennsylvania. Moffet Field belongs to the United States outright. On the basis of this difference in the federal Government's proprietary interest in the two Army facilities, Indiantown Gap Military Reservation is deemed not to be within the "exclusive jurisdiction" of the Government while Moffet Field is deemed within such "exclusive jurisdiction". And from this classification it is deduced that milk sold to the Army for the use of our soldiers at Indiantown Gap Military Reservation must comply with the price provisions of Pennsylvania law, but that milk may be sold to the Army for the use of our soldiers at Moffet Field in disregard of the minimum prices set by California.

Legal refinements are not always the worse for eluding the quick understanding of a layman. But I do not believe that in determining the duty of contracting officers serving the same Army function—a matter that turns on considerations of policy in the relation of the various Army posts to the states in which they are situated—legal categories compel a difference in result where practical judgment and experience lead to an identity in result. The

power given to Congress by Article I, § 8 of the Constitution, to "exercise exclusive Legislation" over federal enclaves is not so tyrannical as to preclude in law what good sense requires.

The so-called exclusive jurisdiction drawn from the grant to Congress of power to legislate exclusively has, as a matter of historical fact, become increasingly less and less exclusive. In early days when the activities of the federal Government made only negligible inroads upon territorial areas within the states, it was assumed that federal exclusiveness was a fact rather than a potentiality, and that the states were precluded from reserving authority in lands within the state which were ceded to the Government. But this notion never became law, and has now been formally repudiated. "The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 148; and see *Mason Co.* v. *Tax Comm'n*, 302 U. S. 186. Indeed, in the case of Moffet Field itself the authority of the United States is not in any true sense exclusive, even as to matters of political authority, for California's act of cession provided that both criminal and civil process issued by California should have the same sanction on Moffet Field as elsewhere in the state.

Since exclusive authority need not be exercised by Congress, there is at times "uncertainty and confusion" whether jurisdiction belongs to the federal Government or has been left with the state. *Bowen* v. *Johnston*, 306 U. S. 19, 27. And although the acts of cession may leave "no room for doubt" that "jurisdiction" "remained with the State", "administrative construction" may nevertheless generate federal jurisdiction. *Id.*, at 29. Even where the federal Government supposedly has "exclusive" jurisdiction, a close examination of complicated legislation may uphold excise tax provisions of a state alcoholic beverage control law but not provisions that "go beyond aids to the collection of taxes and are truly regulatory in character". *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 533. And while lip service is paid to the doctrine of "exclusive jurisdiction" by professing to absorb for federal enclaves those laws of the state which were enforced there prior to its cession, the liberality with which state social measures are deemed not to impinge upon the national purposes for which the

enclave was established, is a recognition in fact that the Constitution permits sensible adjustments between state and federal authority although activities subject to legal control take place on federal territory within a state. See, *e. g., Stewart & Co.* v. *Sadrakula*, 309 U. S. 94.

Enough has been said to show that the doctrine of "exclusive jurisdiction" over federal enclaves is not an imperative. The phrase is indeed a misnomer for the manifold legal phases of the diverse situations arising out of the existence of federally-owned lands within a state—problems calling not for a single, simple answer but for disposition in the light of the national purposes which an enclave serves. If Congress speaks, state power is of course determined by what Congress says. If Congress makes the law of the state in which there is a federal site as foreign there as is the law of China, then federal jurisdiction would really be exclusive. But short of such Congressional assertion of overriding authority, the phrase "exclusive jurisdiction" more often confounds than solves problems due to our federal system.

It is certainly an irrelevant factor in the legal equation before us. For in neither the Pennsylvania nor the California case is the power of Congress or of appropriately exercised military authority called into question. As to Pennsylvania, the Court has found that neither Congressional legislation nor discernible legislative policy immunized a government contractor from state regulation. Of course, if Congressional policy, howsoever expressed, authorized the Quartermaster to enter into such a contract in disregard of local milk price control legislation, the contractor would be immune from obedience to local requirements. Nor has controlling assertion of military authority to disregard local price control been found. There is no suggestion that Congress or the Army has a policy regarding the purchase of milk for soldiers stationed in California which differs from that in Pennsylvania. State regulation, we have held in the case of Pennsylvania, "imposes no prohibition on the national government or its officers". Neither does the California regulation. It clearly does not as to federal sites in California which have been leased to the Government, like the Indiantown Gap Military Reservation, or to sites where the state has reserved concurrent jurisdiction, like those in the *Dravo* and *Mason* cases, *supra*, or to federal territory where jurisdiction is doubtful or ambiguous, like the reservation in *Bowen* v. *Johnston*, *supra*. The California Supreme Court advises us that

within the confines of California the United States is engaged in a great variety of activities: "The federal territory within the state is so fragmented that there may be several federal islands within a single marketing area. If they are citadels of immunity from state jurisdiction, they are also exceptional segments in areas that are otherwise subject to that jurisdiction. They stand out like colored pins on the map of California, and range from military reservations to soldiers' homes, from court houses to penitentiaries, from post offices to Indian reservations, from national parks to regional dams." 19 Cal. 2d 818, 828.

Can it be that the considerations of policy which resulted in a finding that neither the Constitution nor Congressional authority nor appropriate military regulation enabled the Army contracting officer in Pennsylvania, in supplying milk to the soldiers stationed in Pennsylvania, to free local dealers from the necessity of complying with a social measure not unrelated to health and deemed important to the welfare of the people of Pennsylvania, are present in some parts of California and not in others? And must a junior contracting officer of the Quartermaster Corps now attempt to ascertain whether these considerations of policy do or do not apply, depending upon whether the particular enclave is within the "exclusive jurisdiction" of the federal Government—a question so recondite, as the cases show, that it may be settled only by this Court after long travail? Is the result to turn upon the niceties of the law of sales and contracts? Suppose, for example, that the negotiations occur and the contracts are signed off Moffet Field, but delivery takes place there. Must inquiry be made as to where title has "passed" and the sale consummated?

These are not far-fetched suppositions. They are the inevitable practical consequences of making decision here depend upon technicalities of "exclusive jurisdiction"—legal subtleties which may become relevant in dealing with prosecution for crime, devolution of property, liability for torts, and the like, but which as a matter of good sense surely are wholly irrelevant in defining the duty of contracting officers of the United States in making contracts in the various States of the Union, where neither Congress nor the authoritative voice of the Army has spoken. In the absence of such assertion of superior authority, state laws such as those here under consideration appear, as a matter of sound public policy, equally appropriate whether the federal territory

encysted within a state be held on long or short term lease or be owned by the Government on whatever terms of cession may have been imposed.

We are not dealing here with the authority of Congress, about which there can be no controversy, but with the authority of Government contracting officers. It is surely the policy of neither Congress nor the Army that such authority should vary from state to state or from post to post within the same state. On the contrary, there is every reason for assuming that, in the matter here involved, uniformity throughout the land is deemed an essential element of the national policy. Since, as the Court holds in the Pennsylvania case, the national interest is furthered rather than impaired by requiring the Quartermaster at the Indiantown Military Reservation to observe the Pennsylvania Milk Control Law, there is every reason why the Quartermaster at Moffet Field should likewise observe the similar California law. And since he should observe the state law California has a right to insist that the milk dealer licensed by it should not participate in a violation of the law of his state, by license from which he does business.

SUPREME COURT OF THE UNITED STATES.

No. 275.—October Term, 1942.

Pacific Coast Dairy, Inc., Appellant,
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[March 1, 1943.]

Mr. Justice Murphy, dissenting.

I dissent for reasons stated in concurrence in *Penn Dairies, Inc.* v. *Milk Control Commission*, — U. S. — (No. 399 this Term). The fact that Moffett Field is a federal enclave instead of a leasehold does not justify denying California the power to protect the public health by requiring milk dealers selling to the United States to receive a minimum price, a power which we have today held that Pennsylvania possesses. True, Congress is given the power "to exercise exclusive legislation" over federal areas such as Moffett Field, (Constitution, Art. I, § 8, cl. 17), but that does not necessarily mean that the States, no matter what their interest or need, are absolutely without power to enact legislation, not inconsistent with Congressional policy or Constitutional dictates, which will apply in some measure to those areas which are within their boundaries. Before holding that this clause invalidates important state legislation like that now before us, especially at a time when federal activities are greatly expanding and vast areas are being acquired within the States by the federal government, the reasonableness and necessity of such a decision should be thoughtfully examined.

We derive much of our strength as a nation from our dual system of federal government. To promote the harmonious working of that system the general clauses of the Constitution which broadly delineate the boundaries of state and national power should be construed by appraising the respective state and national interests involved and striking a balance which gives appropriate recognition to the legitimate concerns of each government. Since those boundaries are not absolutes, the question necessarily is one

of reasonableness and degree. Cf. Holmes, J., dissenting in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, 222, and again in *Springer v. Philippine Islands*, 277 U. S. 189, 209-210. This is the method which we have applied in testing state regulation of interstate commerce,[1] and it should govern the construction of the "exclusive legislation" clause. If a state is acting in matters normally within its competence, with which it is especially equipped to deal, to achieve important governmental ends such as the protection of the public health and welfare or the maintenance of orderly marketing conditions, the effects of its action should be allowed to extend into federal areas within its boundaries unless inconsistent with an act of Congress or the provisions or necessary implications of the Constitution. This formula allows the States to carry out important programs which must be of state-wide application to be effective and adequately recognizes the paramount character of federal power. Since we have held the comparable Pennsylvania statute does not contravene any act of Congress or the Constitution (*Penn Dairies, Inc.* v. *Milk Control Commission*, *supra*), the instant California legislation satisfies this test.

The "exclusive legislation" clause has not been regarded as absolutely exclusory,[2] and no convincing reason has been advanced why the nature of the federal power is such that it demands that all state legislation adopted subsequent to the acquisition of an enclave must have no application in the area. In waging war under modern conditions it is essential that state and national, military and civilian authorities, work together as a unit, each

[1] While it is Congress that is given the power to regulate commerce among the States, some state regulation of that commerce is permissible. "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved." Parker v. Brown, — U. S. —, —, (No. 46 this Term, pp 14-15). State regulation is to be upheld if "upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress." *Ibid.*, p. 15.

[2] The common sense view has been taken that even though Congress has not legislated to that effect, local law existing at the time an enclave is acquired, which does not defeat the national purpose, remains in effect within the enclave until altered by Congress. Stewart & Co. v. Sadrakula, 309 U. S. 94. And the States may qualify their consent to the federal government's purchase by retaining some measure of jurisdiction. James v. Dravo Contracting Co., 302 U. S. 134.

complementing the others. The state governments have functions to perform that are vital to the war program, including those functions pertaining to the public health. So long as there is no overriding national purpose to be served, nothing is gained by making federal enclaves thorns in the side of the States and barriers to the effective state-wide performance of those functions. Indeed both the federal government and the nation as a whole suffer if the solution of legitimate matters of local concern is thus thwarted and local animosity created for no purpose. A disposition on the part of the federal government or its military arm to ignore local regulations such as the present one is not only fraught with danger to the public health, but also may create a public feeling of distrust which itself will hamper the military effort.

If Congress exercises its paramount legislative power over Moffett Field to deny California the right to do as it has sought to do here, the matter is of course at an end. But until Congress does so, it should be the aim of the federal military procurement officers to observe statutes such as this established by state action in furtherance of the public health and welfare, and otherwise so conduct their affairs as to promote public confidence and good will.